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ABSTRACT

The rights and privileges granted by the Constitution were affirmed for special-needs students through passage of the Individuals with Disabilities Education Act (IDEA). However, difficulties can arise when the duty of the school administrator to maintain order, discipline, and a safe environment clashes with special education students' rights to receive a free appropriate public education in the least restrictive environment. Guidelines that school officials can follow when handling out discipline for students with disabilities are provided here. The text offers a point-by-point analysis of discipline policy. It outlines general disciplinary provisions and their effect on special education. The monograph also provides a detailed overview of when it is appropriate to suspend or expel special education students, including a look at manifestation doctrine, providing service during an expulsion, and injunctions to allow school districts to exclude dangerous students. Suspensions are discussed, as well as other disciplinary sanctions available to administrators, such as corporal punishment, alternative placement, and detention. Other issues that are addressed include individualized discipline programs and guns, alcohol, and drugs. Seven appendices offer further information on incident reports, records of disciplinary action, sample individualized disciplinary policy, and other materials. (Includes an index.) (RJM)

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Disciplinary Options for Students with Disabilities

Allan G. Osborne, Jr.

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DEDICATION

To my mother Ruth, whose courage during her long battle with Alzheimer's Disease has taught me to persevere; to my father Allan, whose strength has been an inspiration; to my wife Debbie, who not only understands, but encourages my passion to write; and to my friend Phil DiMattia, who will never allow me to let these issues rest.

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I. Introduction

A. General Disciplinary Provisions

Today, students in our school systems are generally considered to be full-fledged citizens enjoying the rights and privileges granted by the Constitution, federal laws, and state laws. That is not the way it has always been, however. Until fairly recently, school officials generally did not recognize that the youth in our society held the usual rights and privileges of citizenship. At least as far as students were concerned, schools were not democratic institutions.

The U.S. Supreme Court first acknowledged the fact that juveniles have constitutional rights in criminal proceedings in the landmark *In re Gault*[1] case. Constitutional rights were later extended to students in a school setting in the famous *Tinker v. Des Moines School District*[2] arm band case. In this opinion the Court declared that students did not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Students in the school setting enjoy some rights to freedom of speech and expression. However, responsibility accompanies freedom. School officials may control student speech if there is a reasonable expectation of disruption. Also, speech that is obscene or offensive can be regulated, especially if the audience is immature.[3] Similarly, students have rights to speech and expression in forms other than oral, such as the written word, although those rights too can be circumscribed.[4]

Paramount among the constitutional rights afforded juveniles are due process rights. It has been held in a long line of cases that these rights exist in a school setting. The Supreme Court first extended due process rights to students facing suspension in the *Goss v. Lopez*[5] decision. Specifically, the Court indicated that students facing suspensions of less than ten days were entitled to informal notice of the charges against them and the opportunity for some sort of hearing. Any student who denies the charge must be informed of the evidence against him or her and given the opportunity to present his or her side of the story. These standards are flexible depending on the nature of the misconduct and the severity of the penalty. More formal due process is required for more severe penal-

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[1] 387 U.S. 1, 87 S. Ct. 1428 (1967).

[2] 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed 2d 731 (1969). In this decision the Court held that students had the right to wear black arm bands to school protesting the Vietnam War.

[3] *See generally* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed 2d 549 [32 Educ. L. Rep. 1243] (1986).

[4] *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed 2d 592 [43 Educ. L. Rep. 515] (1988).

[5] 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed 2d 725 (1975).

ties. The Court did not outline the specific procedures to be followed when expulsion is the contemplated sanction, except to say that greater due process would be required. Such greater due process could include a more formal hearing with representation by counsel[6] and cross-examination of witnesses.[7] Although a hearing should be held before a student's removal from school, school officials may hold one after the fact in cases where immediate removal of the student is necessary.

B. Effect on Special Education

In 1975 Congress passed the Education for All Handicapped Children Act, now part B of the Individuals with Disabilities Education Act (IDEA).[8] For states accepting IDEA funds, the IDEA mandated that students with disabilities were to be provided with an appropriate education in the least restrictive environment. Before passing the IDEA, Congress noted that many students with disabilities had previously been either excluded from the educational process altogether or given a substandard education.[9] The IDEA was designed to correct that situation. Many of the students who had been excluded were those with emotional disabilities or behavior disorders.[10]

The IDEA defines *children with disabilities* as children:

> (i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
> (ii) who, by reason thereof, need special education and related services.[11]

According to this definition a student is not considered disabled, for purposes of the IDEA, unless that student requires special education services. Special education is defined as "specially designed instruction, at no cost to the parents or guardians, to meet the unique needs of a child

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[6] H.C. Hudgins & Richard Vacca, Law and Education: Contemporary Issues and Court Decisions (1995).

[7] Robert J. Shoop & Dennis R. Dunklee, School Law for the Principal (1992) at 166.

[8] 20 U.S.C. § 1401 *et seq.* For the sake of consistency and to avoid confusion the law will be referred to by its new title throughout this monograph.

[9] 20 U.S.C. § 1400(b).

[10] *See for example* Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

[11] 20 U.S.C. § 1401(a)(16A).

with a disability."[12] Students between the ages of three and twenty-one are eligible for services.[13]

The IDEA provided students with disabilities and their parents with unprecedented due process rights, including an elaborate mechanism for dispute resolution. Among those rights was the provision that a school district could not change the placement of a student with disabilities without first notifying the student's parents and giving them the opportunity to object. If the parents did object, they could request a due process hearing and the student's placement could not be changed while that hearing was pending unless the parents consented to the change.[14]

It is an unfortunate aspect of education today that students do not always arrive at school well disciplined and ready to learn. Many educators often lament that they spend more time disciplining than teaching. School administrators frequently must take disciplinary action. Some disciplinary sanctions, such as detentions or suspensions from extracurricular activities, result in a loss of privileges for the student but do not result in a loss of educational opportunity. However, sometimes more severe sanctions, such as expulsions or suspensions from school, which do result in a loss of educational services, are necessary. Suspensions and expulsions have been used by school officials as disciplinary tools for many years. Normally a suspension is defined as a short-term exclusion, generally not exceeding a few days, and an expulsion as a long-term exclusion from school.[15] Frequently suspensions longer than ten days have been treated as expulsions.[16] Similarly, serial suspensions and indefinite suspensions procedurally have been treated as the equivalent of an expulsion.[17]

Students with disabilities have rights to due process when facing disciplinary sanctions that go beyond those extended to other students.

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[12] 20 U.S.C. § 1401(a)(16).

[13] 20 U.S.C. § 1412(2)(B).

[14] 20 U.S.C. § 1415.

[15] E. Gordon Gee & David J. Sperry, Education Law and the Public Schools: A Compendium (1978).

[16] In Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed.2d 725 (1975) the U.S. Supreme Court distinguished between short-term suspensions of 10 days or less and longer suspensions and expulsions in terms of the degree of due process required. Thus traditionally suspensions of more than 10 days are treated procedurally in the same manner as expulsions. The Department of Education has made a similar distinction by indicating that a suspension of 10 days or less is not a change in placement whereas a longer suspension is a change in placement. Policy Letter, EHLR 211:437 (OSEP 1987). *See also* Robert J. Shoop & Dennis R. Dunklee, School Law for the Principal (1992) at 166.

[17] Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979); Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979); Adams Cent. Sch. Dist. v. Deist, 334 N.W.2d 775 [11 Educ. L. Rep. 1020] (Neb. 1983) *modified* 338 N.W.2d 591 [13 Educ. L. Rep. 846] (Neb. 1983).

Since an expulsion results in a deprivation of educational opportunity, and possibly a denial of the rights guaranteed by the IDEA, further safeguards are required. The IDEA does not specifically address discipline; however, many of its provisions have implications for the disciplinary process.[18] In fact, the U.S. Supreme Court, in *Honig v. Doe*,[19] suggested that the IDEA was passed to prevent school districts from unilaterally excluding students whose disabilities resulted in behavior problems. Writing for the majority, Justice Brennan specifically stated that, in the Court's opinion, Congress very much intended to strip schools of the unilateral authority they once had to exclude students with disabilities, particularly those with behavior problems, from school.

In *Honig*, two students, who had been classified as emotionally disturbed with aggressive tendencies, faced expulsion for various acts of misconduct. The first student, identified as John Doe, attended a public school developmental center for students with disabilities. He was suspended and recommended for expulsion for assaulting another student and breaking a school window. The second student, identified as Jack Smith, attended a special education placement in a regular public school. He was suspended and recommended for expulsion for various offenses including making sexual comments to female students. The federal district court and the Ninth Circuit Court of Appeals held that students with disabilities could not be expelled if their misconduct was a manifestation of their disabilities. Since these students had been classified as emotionally disturbed with aggressive tendencies there was little question that their misconduct was related to their disabilities.

When the lawsuit reached the Supreme Court it was held to be moot for John Doe as he had already passed the ceiling age of eligibility for special education services under state and federal laws. However, the Court affirmed the appeals court's decision regarding Jack Smith holding that there was no dangerousness exception to the IDEA's status quo provision. While the Court held that students with disabilities could not be expelled for conduct related to their disabilities, it did state that a student who posed an immediate threat to the safety of others could be suspended for up to ten school days. The Court indicated that this cooling off period could be used to reach an agreement with the student's parents for an alternate, presumably more restrictive, placement. If the parents objected to a change in placement, the high Court stated that school officials could seek relief from the courts. In appropriate cases the courts could temporarily enjoin a dangerous special education student from at-

[18] Gail Sorenson, *Update on Legal Issues in Special Education Discipline*, 81 EDUC. L. REP. 399 (1993).

[19] 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed 2d 686 [43 EDUC. L. REP. 857] (1988).

tending school according to the Court's ruling. However, the burden clearly is on school officials to show that the student presents a danger. The Court further indicated that other normal disciplinary procedures that did not constitute a change in placement could be used with special education students.

While the Supreme Court's decision provided school officials with a mechanism to immediately deal with a dangerous situation involving a student with disabilities, it left many unanswered questions. One of the first questions that arose after the ruling was whether the ten days of suspension allowed by the Court was consecutive or cumulative.[20] A related question concerns whether or not an in-school suspension would count toward the ten-day limit.[21] A final question involves the issue of whether special education services may be terminated if a student is expelled after a determination that the student's misconduct was not causally related to the student's disability.[22]

Students with disabilities also have protections under section 504 of the Rehabilitation Act.[23] Section 504 prohibits discrimination against an individual because of that individual's disability by any recipient of federal funds. Section 504 provides protections to students with disabilities who are not covered by the IDEA. To be eligible for the IDEA's protections, a student must require special education services as a result of the disability.[24] Students who have recognized disabilities but do not require special education services are entitled under section 504 to an appropriate education designed to meet their individual needs.[25] In some circumstances this may require a school district to provide reasonable accommodations. Any student eligible for special education services under the IDEA also is entitled to the protections of section 504. The Americans with Disabilities Act[26] (ADA) may provide protection as well. However, at least as far as students in the public schools are concerned, the ADA's protections are almost identical to those of section 504.[27]

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[20] Perry A. Zirkel & Siegfried C. Mueller, *The Ten-Day Rule: Merely Consecutive or Also Cumulative?* NOLPE NOTES, Mar. 1989 at 1.

[21] Eugene A. Lincoln, *Disciplining Handicapped Students: Questions Unanswered in Honig v. Doe*, 51 EDUC. L. REP. 1 (1989).

[22] Gail Sorenson, *Special Education Discipline in the 1990s*, 62 EDUC. L. REP. 387 (1991).

[23] 29 U.S.C. § 794.

[24] 20 U.S.C. § 1401(a)(16)(A)(ii).

[25] For a thorough treatment of section 504 see PERRY ZIRKEL & JEANNE KINCAID, SECTION 504, THE ADA AND THE SCHOOLS (Supp. 3, 1996). For a review of section 504's reasonable accommodation provision see David Dagley & Charles Evans, *The Reasonable Accommodation Standard for Section 504-Eligible Students*, 97 EDUC. L. REP. 1 (1995).

[26] 42 U.S.C. § 12101 *et seq.*

[27] Allan Osborne, *Court Interpretations of the Americans with Disabilities Act and Their Effect on School Districts*, 95 EDUC. L. REP. 489 (1995).

C. Emotionally Disturbed Students

As was mentioned in the preceding section, many of the students who had been excluded from public education prior to the passage of the IDEA were emotionally disturbed or behaviorally disordered. In the *Honig* decision the Supreme Court specifically stated that in passing the IDEA Congress intended to limit a school district's authority to unilaterally exclude these students from the educational process. Since many of the court cases involving discipline concern students who are classified as emotionally disturbed, it may be helpful at this juncture to examine the criteria for classification as emotionally disturbed.

The IDEA defines the term *serious emotional disturbance* as a condition exhibiting one or more of the following characteristics:

> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
> (C) Inappropriate types of behavior or feelings under normal circumstances;
> (D) A general pervasive mood of unhappiness or depression; or
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.[28]

These regulations further state that the condition must be exhibited to a marked degree over a long period of time and must adversely affect a student's educational performance.[29] Furthermore, the regulations state that the term includes schizophrenia, but specifically excludes students who are socially maladjusted unless they are determined to also be seriously emotionally disturbed.[30]

The decision as to whether or not a student is entitled to special education services under the classification of seriously emotionally disturbed has been controversial, particularly due to the requirement that the student's educational performance must be adversely affected. Some courts have held that students who exhibit the conditions outlined in the regulations are not seriously emotionally disturbed if they are able to maintain appropriate academic achievement.[31]

A decision of the federal district court in Connecticut is illustrative. That court held that a gifted student who had been hospitalized because

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[28] 34 C.F.R. § 300.7(b)(9)(i).
[29] *Id.*
[30] 34 C.F.R. § 300.7(b)(9)(ii).
[31] This may vary from state to state depending on the individual state's definition of *emotionally disturbed* and eligibility criteria.

of emotional concerns was not seriously emotionally disturbed and was not entitled to special education services.[32] Although the student had some emotional difficulties, the court found that these difficulties did not adversely affect his educational performance. Thus, it held that the student was not seriously emotionally disturbed.

Similarly, the Tenth Circuit Court of Appeals held that a student who experienced problems with peer interaction, impulse control, and excessive anxiety was not seriously emotionally disturbed even though she had attempted suicide.[33] The court stated that the fact that the child was socially maladjusted was not by itself evidence that she was seriously emotionally disturbed. The district court had found that the student had a conduct disorder but, the appeals court held that it did not warrant classification as seriously emotionally disturbed. The District Court for the District of Columbia also upheld a school district's decision that a student who had an attention deficit hyperactivity disorder (ADHD) was not eligible for special education services.[34] School officials had determined that the student's educational performance had not been adversely affected by the ADHD since his academic performance was superior.

Academic failure is the linchpin for determining whether or not a student can be classified as seriously emotionally disturbed. The students in the cases cited above did not experience academic failure in spite of their emotional difficulties. On the other hand, the Sixth Circuit Court of Appeals held that a student who had average intelligence, but had a long history of academic failure, difficulty making and maintaining friendships, and an inability to create normal social bonds was seriously emotionally disturbed and entitled to services under the IDEA.[35] The court stated that school officials had failed to properly make the determination that the student was disabled in that they failed to fully examine his academic, emotional, and psychological profile.

II. Expulsion of Special Education Students

A. Expulsion Held To Be a Change in Placement

Courts have consistently held that school districts may not impose the severe disciplinary sanction of expulsion on a student with disabilities unless additional due process procedures have been provided to the

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[32] Doe v. Board of Educ. of Conn., 753 F. Supp. 65 [65 Educ. L. Rep. 109] (D. Conn. 1990).

[33] A.E. v. Independent Sch. Dist. No. 25 of Adair County, Okla., 936 F.2d 472 [68 Educ. L. Rep. 278] (10th Cir. 1991).

[34] Lyons v. Smith, 829 F. Supp. 414 (D.D.C. 1993).

[35] Babb v. Knox County Sch. Sys., 965 F.2d 104 [75 Educ. L. Rep. 767] (6th Cir. 1992).

student. Soon after the IDEA was implemented, *Stuart v. Nappi*,[36] a case in which a school district intended to expel a special education student, found its way to the federal district court in Connecticut. The student, who had been diagnosed as having learning disabilities but also had a history of behavior problems, had been suspended for ten days because of her involvement in school-wide disturbances. The superintendent recommended expulsion for the remainder of the school year. The student's attorney initiated administrative due process appeals under the IDEA to request a review of the student's special education program. Her attorney then argued in court that an expulsion, while administrative appeals were pending, would violate the IDEA's status quo provision.[37] The school district, on the other hand, argued that special education procedures and disciplinary procedures were distinct and should not interfere with each other. The district court disagreed, holding that an expulsion was a change in placement that could take place only after the IDEA's procedures had been followed.[38] Since there was no evidence that the student was dangerous, the court concluded that expelling her prior to the resolution of her special education complaint would be a direct violation of the IDEA. The court further stated that if schools were permitted to expel special education students without following the IDEA's change in placement procedures, their rights to a free appropriate public education in the least restrictive environment could be circumvented.

Other courts also have held that an expulsion, since it results in the termination of all educational services, is a change in placement.[39] Under these rulings a school district is required to treat an expulsion as it would any other change in placement. Before a special education student's placement can be changed, the school district must notify the parents of their intent to change the placement and give the parents the opportunity to object. If the parents object to the change in placement, and administrative appeals are initiated, the child's placement may not be changed while those proceedings are pending unless the parents agree to the change.[40]

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[36] 443 F. Supp. 1235 (D. Conn. 1978).

[37] 20 U.S.C. § 1415(e)(3). [A student's placement may not be changed while a hearing is pending without parental consent.]

[38] *See* 20 U.S.C. § 1415(b)(1)(C), 1415(e)(3).

[39] S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981); Blue v. New Haven Bd. of Educ., EHLR 552:401 (D. Conn. 1981); Kaelin v. Grubbs, 682 F.2d 595 [5 EDUC. L. REP. 710] (6th Cir. 1982); Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 [43 EDUC. L. REP. 857] (1988).

[40] 20 U.S.C. § 1415(b)(1)(C), 1415(e)(3).

The Ninth Circuit Court of Appeals enumerated in *Doe v. Maher*[41] the additional due process procedures a school district must follow when it intends to expel a student with disabilities. According to that court, written notice must be given to the parents or guardian, the evaluation and placement team must be convened to determine the reason for the misconduct and consider the appropriateness of the student's current placement, an evaluation of the student's current educational needs must be conducted, the parents must be informed of their rights to appeal, and the student must be allowed to remain in the then current placement until all issues are resolved.

An Indiana district court, in *Doe v. Koger*,[42] stated that in passing the IDEA, Congress clearly intended to limit a school district's ability to expel a student with disabilities. That principle was affirmed by the U.S. Supreme Court in *Honig v. Doe*.[43] The Court stated that when Congress passed the IDEA it intended to strip schools of the unilateral authority they once had to exclude disabled students, particularly those with emotional difficulties. The high Court, agreeing that an expulsion is a change in placement, held that the IDEA's status quo provision prevented the school from unilaterally excluding students with disabilities for disruptive behavior. In the absence of parental consent for a change in placement, school officials must go to court to obtain an injunction allowing the student's removal.

An Office for Civil Rights' (OCR) internal memorandum provides some additional guidance. That publication states that any exclusion of a student with disabilities that is permanent, indefinite, or for a period greater than ten consecutive days is a significant change in placement under the section 504 regulations.[44] OCR further interprets section 504 to require a re-evaluation before any significant change in placement can occur.[45] Section 504 stipulates that the parent or guardian must be notified before any action regarding the identification, evaluation, or educational placement of a student covered by the Act is taken.[46] One court has held that a school violated section 504 and the ADA by expelling a student without

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[41] 793 F.2d 1470 [33 EDUC. L. REP. 125] (9th Cir. 1986), *aff'd on other grounds sub nom.* Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 [43 EDUC. L. REP. 857] (1988).

[42] 480 F. Supp. 225 (N.D. Ind. 1979).

[43] 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 [43 EDUC. L. REP. 857] (1988).

[44] *OCR Memorandum, Long-term Suspension or Expulsion of Handicapped Students*, EHLR 307:05 (OCR 1988), *citing* 34 C.F.R. § 104.35(a).

[45] *Id.*

[46] 34 C.F.R. § 104.36.

making an inquiry into whether her misbehavior was related to her disability or considering reasonable accommodations instead of expulsion.[47]

B. Manifestation Doctrine

In *Doe v. Koger*[48] the federal district court in Indiana held that a school district may not expel a special education student whose misbehavior is caused by the disability, but may expel the student if the misbehavior is not related to the disability. The court emphasized, however, that this determination must be made through the IDEA's change in placement procedures. In this case a student with mild mental disabilities was expelled for disciplinary reasons. However, in overturning his expulsion the district court held that the IDEA clearly limited a school district's right to expel a student with disabilities.

The Fifth Circuit Court of Appeals agreed with this concept in *S-1 v. Turlington*,[49] but added that the determination of whether the misconduct was a manifestation of the student's disability must be made by a specialized and knowledgeable group of persons. A number of students who had been classified as mentally retarded had been expelled for conduct that ranged from defiance of authority to sexual acts. One of the students requested a hearing to determine if his misbehavior was a manifestation of his disability. The Superintendent of Schools determined that it was not because the student was not classified as emotionally disturbed. The district court, however, overturned the Superintendent's decision, and the appeals court affirmed. The Fifth Circuit also placed the burden on school officials to raise the question of whether the misconduct is a manifestation of the disability. Thus, school officials cannot wait for a student to challenge an expulsion decision to make the manifestation determination.

1. Definition of Manifestation

Unfortunately courts are not united in their definitions of the term *manifestation*. The dictionary also provides little help in defining the term in the context of discipline.[50] The Ninth Circuit Court of Appeals, in *Doe v. Maher*[51] indicated that the relationship between the disability and

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[47] Thomas v. Davidson Academy, 846 F. Supp. 611 [90 EDUC. L. REP. 132] (M.D. Tenn. 1994).

[48] 480 F. Supp. 225 (N.D. Ind. 1979).

[49] 635 F.2d 342 (5th Cir. 1981). *See also* Kaelin v. Grubbs, 682 F.2d 595 [5 EDUC. L. REP. 710] (6th Cir. 1982).

[50] The most relevant definition of the word *manifest* found in Webster's Collegiate Dictionary is "to make evident or certain by showing or displaying."

[51] 793 F.2d 1470 [33 EDUC. L. REP. 125] (9th Cir. 1986), *aff'd on other grounds*, Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 [43 EDUC. L. REP. 857] (1988).

the misconduct must be direct and causal. Specifically, the court stated that the term refers to "conduct that is caused by, or has a direct and substantial relationship" to the student's disability.[52] The court paraphrased its definition by explaining that the student's disability must significantly impair the student's behavioral controls. The court added that the term does not embrace conduct that "bears only an attenuated relationship" to the disability.[53]

A Fourth Circuit Court of Appeals' opinion indicates that the relationship between the disability and the misconduct can be indirect or more attenuated than allowed by the Ninth Circuit. In *School Board of the County of Prince William v. Malone*,[54] the court found that a connection between a student's disability and misbehavior existed after a committee of special education professionals determined that no relationship existed. The student was classified as learning disabled but his Individualized Education Program (IEP)[55] indicated that he had borderline intelligence and had difficulty behaving. He was expelled after he acted as a go-between in several drug transactions. When the dispute over his expulsion reached the court level, the trial court found that the student's learning disabilities caused him to have a poor self-image, which caused him to seek peer approval by acting as the go-between in the drug transactions. That court further found that his learning disabilities prevented him from understanding the consequences of his actions. The appeals court affirmed, holding that the district court's finding was not clearly erroneous. The appeals court added that to allow an expulsion in such an instance would not be fair or in keeping with the IDEA, since the student would be expelled for behavior over which he had no control.

The court in *Malone* affirmed the decision of the district court which had found that the student's learning disability caused him to have a loss of self-image, which caused him to seek peer approval by engaging in drug trafficking.[56] The court further found that although the student probably understood that his involvement with drugs was wrong, his learning disability prevented him from considering the consequences of his actions. It should be noted that the appeals court's task was to determine if the district court's decision was clearly erroneous. The appeals court was

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[52] *Id.* n.8.

[53] *Id.*

[54] 762 F.2d 1210 [25 EDUC. L. REP. 141] (4th Cir. 1985).

[55] An IEP is a written document that outlines the student's current level of performance, annual goals and short-term objectives, and the specific educational services to be provided to the student. 20 U.S.C. § 1401(a)(20).

[56] School Bd. of the County of Prince William v. Malone, 762 F.2d 1210 [25 EDUC. L. REP. 141] (4th Cir. 1985).

influenced by decisions of a local hearing officer and state reviewing officer who both had determined that there was a relationship between the student's disability and misconduct. The Supreme Court has instructed lower courts to give deference to the decisions of hearing officers.[57]

Other courts have taken an intermediate approach suggesting that *manifestation* encompasses a connection between the disability and conduct but not necessarily the direct and substantial relationship required by the Ninth Circuit. A district court in Indiana held that school districts are prohibited from expelling students who are disruptive "because of" their disabilities.[58] This standard does not necessarily require a finding that the student's behavioral controls are impaired by the disability but simply that the disability in some way causes the student to be disruptive. The Fifth Circuit Court of Appeals stated that an expulsion must be accompanied by a determination as to whether the student's misconduct "bears a relationship" to the disability.[59] The court added that a determination that a student knew the difference between right and wrong was not tantamount to a decision that the misconduct was not a manifestation of the disability. The Sixth Circuit Court of Appeals cited both of those decisions favorably.[60] Although these decisions did not require the substantial relationship test advocated by the Ninth Circuit, they did require a more direct relationship between the misconduct and the disability than was required by the Fourth Circuit.

Unfortunately when the U.S. Supreme Court decided the *Honig* case it did not provide us with a definition of manifestation. Since the students in that case were classified as emotionally disturbed, the Court assumed as a given that their misconduct was related to their disabilities. Thus the definition of *manifestation* is not clear and depends, in part, on which court decisions are binding in the individual school district's geographic location. State special education laws may provide more guidance and should be consulted.

2. Making the Manifestation Determination

The U.S. Department of Education, in several policy letters, has outlined the procedures that must be followed when a school district contemplates expelling a student with disabilities. For the most part these letters restate the case law that has been outlined above; however, they do clarify some gray areas. One letter advises that the first step is to

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[57] Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed 2d 690 [5 Educ. L. Rep. 34] (1982).

[58] Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979).

[59] S-1 v. Turlington, 635 F.2d 342, 346 (5th Cir. 1981).

[60] Kaelin v. Grubbs, 682 F.2d 595 [5 Educ. L. Rep. 710] (6th Cir. 1982).

make a determination concerning whether the misconduct is a manifestation of the student's disability or is due to an inappropriate placement.[61] In the *Turlington* decision the Fifth Circuit Court of Appeals held that the manifestation decision must be made by a group of specialized and knowledgeable persons. Individuals making up the group should have two types of knowledge: (1) personal knowledge of the student, and (2) knowledge of special education, especially the etiology and characteristics of the student's particular disability.[62]

The Department of Education has indicated that the group responsible for making the manifestation determination should be composed of individuals similar to those described in the IDEA regulations as having the responsibility to develop the student's IEP.[63] The IDEA provides that a school district representative who is qualified to provide or supervise special education, the student's teacher, a person qualified to interpret evaluation data, the student's parents, and the student, if appropriate, should be included in any meeting in which a student's IEP is developed, reviewed, or revised.[64] Another policy letter states that the school board, its subcommittees, or an individual board member would not be qualified to make the manifestation determination.[65]

The manifestation determination also must be individualized. It may not be made on the basis of characteristics generally exhibited by others with the same disability.[66] In this respect the group must consider whether the disability, as it affects the student in question, manifested the specific misconduct. An important consideration would be the severity of the disability in that student.[67] The group should also consider whether the student has any previously unidentified disabilities that might have caused the misconduct.[68] Furthermore, the manifestation determination must be incident specific. Again, generalizations cannot be the determinative factor. The group must consider whether the disability, as exhibited by the student, could have caused the particular misconduct giving rise to the disciplinary action.

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[61] Uhler Letter, 18 IDELR 1238 (OSEP 1992).

[62] *OCR Memorandum: Suspensions of Handicapped Students - Deciding Whether Misbehavior Is Caused by a Child's Handicapping Condition*, 16 EHLR 491 (OCR 1989).

[63] *Id.*

[64] *See* 34 C.F.R. §§ 300.344, 300.533(a)(3).

[65] Case Letter, 22 IDELR 370 (OSEP 1994).

[66] David Dagley, Michelle McGuire, & Charles Evans, *The Relationship Test in the Discipline of Disabled Students*, 88 EDUC. L. REP. 13 (1994). For a recent decision on point *see* J.B. by N.K. v. Independent Sch. Dist. No. 191, Burnsville, Minn., 21 IDELR 1157 (D. Minn. 1995).

[67] *Elk Grove Unified Sch. Dist.*, 16 EHLR 622 (SEA Cal. 1989).

[68] *Modesto City Sch.*, 21 IDELR 685 (SEA Cal. 1994).

If evaluation data is not current, a re-evaluation should be conducted.[69] Even though the IDEA only requires a re-evaluation every three years, one is warranted if the student's circumstances change. A sudden change in behavior would be such a circumstance. Also several courts have held that a re-evaluation is required whenever a significant change in placement is being considered.[70] The re-evaluation should include a psychological assessment designed specifically to elicit data relative to the behavior which brought about the disciplinary action.[71] If those who conducted the most recent assessments are not part of the group making the manifestation determination, they should be consulted regarding the specific incident in question.

Other factors that could have caused the misbehavior may be considered.[72] However, if several factors contribute to the misbehavior and the student's disability is one of the contributing factors, the nexus between disability and misconduct has been established.

If the group determines that the misconduct is either a manifestation of the student's disability, or results from an inappropriate placement or IEP,[73] the student may not be suspended for more than ten days[74] but school officials should reconsider the student's placement.[75] Nonpunitive changes in placement may be appropriate and should be implemented subject to applicable procedural safeguards[76] and the IDEA's least restrictive environment provision.[77] The student may be suspended for more than ten days if the misconduct is not caused by the disability or an inappropriate placement.[78]

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[69] *In re* Child with Disabilities, 16 EHLR 207 (SEA Cal. 1989); *Sioux City (Iowa) Sch. Dist.*, 16 EHLR 308 (OCR 1989).

[70] *See for example* Brimmer v. Traverse City Area Pub. Sch., 872 F. Supp. 447 [97 EDUC. L. REP. 207] (W.D. Mich. 1994). In addition OCR has stated that under section 504 a re-evaluation must be conducted before any significant change in placement occurs. *OCR Memorandum: Long-term Suspension or Expulsion of Handicapped Students*, EHLR 307:05 (OCR 1988).

[71] *OCR Memorandum: Suspensions of Handicapped Students–Deciding Whether Misbehavior Is Caused by a Child's Handicapping Condition*, 16 EHLR 491 (OCR 1989).

[72] *Elk Grove Unified Sch. Dist.*, 16 EHLR 622 (SEA Cal. 1989).

[73] In determining whether the placement was inappropriate the group should use the same standards that apply when prospectively determining whether a proposed placement is appropriate. Unless state law dictates otherwise, the basic criterion of an appropriate placement is whether or not it resulted in educational benefit to the student. Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 [5 EDUC. L. REP. 34] (1982).

[74] Uhler Letter, 18 IDELR 685 (OSEP 1992).

[75] Bogpus Letter, 20 IDELR 625 (OSEP 1993).

[76] *Id.*

[77] Uhler Letter, 18 IDELR 1238 (OSEP 1992).

[78] *Id.*

OCR has provided some similar guidelines under the provisions of section 504. Although many of the OCR guidelines are identical to the standards under the IDEA, they will be repeated here for clarity. According to OCR a re-evaluation that includes a determination of whether the misconduct is caused by the student's disability is required before a significant change in placement can occur.[79] That determination is to be made by a group of persons including individuals personally familiar with the student and who have knowledge about special education.[80] To make that determination this group should consider psychological evaluation data related to behavior and other information that is recent enough to afford an understanding of the student's current behavior.[81] If it is determined that the student's misconduct is caused by the student's disability, a determination must then be made as to whether the student's current educational placement is appropriate.[82] If it is not, steps must be taken to place the student appropriately.

As are any matters related to a student's special education program, the manifestation decision is subject to the IDEA's administrative appeals process. If a parent decides to contest the manifestation decision, any long-term suspension or expulsion would be stayed.[83]

In summary, the group making the disability determination must have personal knowledge of the student and the student's disability. The determination must be individualized and incident specific. Unless the latest evaluation data is relatively recent, a re-evaluation, including a psychological assessment, should be conducted as part of the determination. Since the determination must be individualized and must be conducted in light of the student's unique situation, it is difficult to provide further guidelines. However, an attempt to do just that will be made in the next section.

3. Manifestation Decision-making Outline

Hartwig and Ruesch have stated, "There is no established standard for a manifestation determination. Court decisions have provided only general guidance and case law does not provide a simple rule of thumb."[84] Keeping the general guidance provided by the courts in mind, the outline

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[79] *OCR Memorandum: Long-term Suspension or Expulsion of Handicapped Students*, EHLR 307:05 (OCR 1988).

[80] *OCR Memorandum: Suspensions of Handicapped Students - Deciding Whether Misbehavior Is Caused by a Child's Handicapping Condition*, 16 EHLR 491 (OCR 1989).

[81] *Id.*

[82] *OCR Memorandum: Long-term Suspension or Expulsion of Handicapped Students*, EHLR 307:05 (OCR 1988).

[83] Boggus Letter, 20 IDELR 625 (OSEP 1993).

[84] ERIC P. HARTWIG & GARY M. RUESCH, DISCIPLINE IN THE SCHOOL at 93 (1994).

below has been developed to assist school authorities with the difficult task of determining whether or not a given act of misconduct is a manifestation of the student's disability. School officials are cautioned, however, that above all else, the manifestation determination must be individualized. Thus, the criteria in this outline may need to be adjusted to fit individual student needs and situations.

It is recommended that the manifestation determination be made by the same group of persons charged with conducting the student's most recent evaluation and developing the student's current IEP. Additional persons may be added to this group if needed. For example, a teacher who witnessed the misconduct and could provide a detailed description of the incident could provide insight into the cause of the misbehavior. Also, a teacher who was not part of the student's evaluation and placement team, but knows the student well, could offer valuable assistance. If available evaluation data is more than one year old, it is recommended that a re-evaluation be conducted before the manifestation decision is undertaken.

Once assembled, those who are to make the manifestation determination should carefully examine and consider the following factors:

a. The Student's Disability Classification

Identification and classification of the student as *emotionally disturbed, behaviorally disordered*, or some similar label, provide support for the contention that an act of misconduct may be a manifestation of the student's disability. However, the manifestation determination should not be made on the basis of the student's disability classification alone. The fact that a student is classified as emotionally disturbed or behaviorally disordered does not mean that the student is unable to obey school rules. Similarly, the fact that a student has not been categorized as emotionally disturbed or behaviorally disordered does not mean that the misconduct is not related to the disability. Consideration should be given to whether or not the student's disability either prevented the student from understanding the consequences of the behavior or impaired the student's ability to control the behavior.

b. The Student's IEP

Information in the student's IEP may provide some indication as to whether or not the student's disability could cause the student to misbehave. For example, statements that the student suffers from a poor self-esteem, does not understand cause and effect relationships, acts impulsively, or has low frustration tolerance could infer that under certain situations, the student's misconduct could be connected to the disability. Naturally, a more direct statement such as, "At times the student has difficulty following school rules" would provide stronger evidence of a causal con-

nection. The IEP may also supply information about past behaviors and the context in which misbehavior may occur.

c. Recent Evaluation Data

Evaluation data, particularly psychological data, may be most helpful in making the manifestation determination. If the evaluation data indicates that the student has a propensity to be disruptive, becomes easily angered, or may lash out when feeling threatened, misconduct can be predicted. Additionally, evaluation data may provide information that a student has poor impulse control, doesn't fully understand the consequences of his or her behavior, doesn't know right from wrong, etc. This information can provide valuable clues as to whether or not there is a relationship between the student's disability and misconduct. Evaluation data should be current enough that it relates to the student's present situation. An observation of the student in the environment in which the misbehavior occurred would also provide context-specific information.

d. The Student's Behavioral History

Is the current misconduct part of a pattern of misbehavior or is it an isolated incident? An act of misconduct that is part of a pattern is more likely to be an indication of disability-related behavior than is a single isolated incident.

e. The Situation

Students may behave differently in different situations. An examination of the situation that led to the act of misconduct may provide much insight concerning a possible relationship between the misconduct and the student's disability. Consideration should be given to how the student's disability may have affected the student's judgment in this situation or interpretation of the events that led to the behavioral incident. It also should be determined if the student understood and was aware of the consequences of the misconduct.

After all relevant information has been examined and the above factors have been considered, those charged with making the manifestation determination should proceed as they would in making any other decision regarding the student's identification, classification, or placement. In this regard, there is no substitute for sound professional judgment. There are no cookbook criteria for determining whether or not the information available indicates that the misconduct was or was not a manifestation of the student's disability. Thus, those making the decision must rely on their professional knowledge, their knowledge of the student, and their understanding of the circumstances that led to the misconduct in making their decision.

C. Provision of Special Education Services During an Expulsion

Even if school officials are able to establish that a connection between the student's disability and misconduct does not exist, and can successfully expel the student, they still may be required to provide special education services during the expulsion period. In *S-1 v. Turlington*[85] the Fifth Circuit Court of Appeals held that even when a student with disabilities is expelled using the proper procedures under the proper circumstances, a complete cessation of educational services during the expulsion period is not authorized.

The Ninth Circuit Court of Appeals, on the other hand, has held that when a student with disabilities is properly expelled, the school district may cease providing all educational services, just as it could in any other case.[86] To do otherwise, that court reasoned, would amount to asserting that all acts of a child with disabilities are attributable to the disability. Although the U.S. Supreme Court heard an appeal of this case, it did not review this aspect of the appeals court's decision. The Fourth Circuit Court of Appeals, in a recent en banc decision has agreed with the Ninth Circuit's position.[87] The Fourth Circuit held that the right to a free appropriate public education can be forfeited by engaging in criminal activity or misconduct that is not related to the student's disability.

The U.S. Department of Education does not agree with the Ninth and Fourth Circuits' interpretation and is likely to appeal the Fourth Circuit's ruling. Adopting a stance similar to that taken by the Fifth Circuit, the Department has issued numerous policy letters stating that the IDEA requirement that a free appropriate public education be provided to all students with disabilities applies to students serving long-term suspensions or expulsions resulting from misconduct that was not a manifestation of their disabilities.[88] Although these policy letters are advisory, school officials in states outside the Fourth or Ninth Circuits

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[85] 635 F.2d 342 (5th Cir. 1981). *See also* Board of Trustees of Pascagoula Mun. Separate Sch. Dist. v. Doe, 508 So. 2d 1081 [40 EDUC. L. REP. 1090] (Miss. 1987).

[86] Doe v. Maher, 793 F.2d 1470 [33 EDUC. L. REP. 125] (9th Cir. 1986), *aff'd on other grounds sub nom.* Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed 2d 686 [43 EDUC. L. REP. 857] (1988).

[87] Commonwealth of Va. Dep't of Educ. v. Riley, No. 95-2627 (4th Cir. Feb. 5, 1997) *rev'g* 86 F.3d 1337 [110 EDUC. L. REP. 552] (4th Cir. 1996). Following the *en banc* hearing the majority adopted Judge Luttig's dissent from the original decision which can be found at 86 F.3d 1347 [110 EDUC. L. REP. 562].

[88] New Letter, EHLR 213:258 (OSERS 1989); Davis Letter, 16 EHLR 734 (OSERS 1989); Symkowick Letter, 17 EHLR 469 (OSERS 1991); Smith Letter, 18 IDELR 685 (OSERS 1992); Uhler Letter, 18 IDELR 1238 (OSEP 1992); Taylor Letter, 20 IDELR 542 (OSERS 1993); Boggus Letter, 20 IDELR 625 (OSEP 1993); Price Letter, 20 IDELR 1256 (OSERS 1993); Hartman Letter, 23 IDELR 894 (OSEP 1995).

should provide special education services to any students with disabilities who have been expelled since most courts give great weight to an agency's interpretation of its own regulations.[89]

An OCR memorandum states that under section 504 all educational services to the student may cease during an expulsion if it has been determined that the misconduct was not caused by the student's disability.[90] In a footnote OCR advises that this policy should not be applied in the Fifth Circuit due to the *Turlington* decision.[91] In another footnote OCR stresses that the memorandum is based on the requirements of section 504 only and that the IDEA may have different requirements. As was stated above, the Department of Education interprets the IDEA as requiring special education services during any expulsion. Thus, the OCR policy may be applied only to students with disabilities who are not covered by the IDEA.

The difference between the IDEA and section 504 requirements is due to the underlying purpose of each statute. Section 504 was designed to prevent discrimination against individuals with disabilities whereas the IDEA imposes affirmative obligations on school districts to provide special education services to students with disabilities.

D. Alternatives to Expulsion

In the *Honig* decision the Supreme Court indicated that school districts may use other normal disciplinary procedures with students with disabilities.[92] The only sanctions that are prohibited are those that would result in a change in placement and are not instituted in conformance with the IDEA's procedures. Thus, detentions, time-out, in-school suspensions, and suspensions of up to ten days are allowed. In addition, students with disabilities may be put on a modified school day or transferred to alternate, more restrictive settings as long as proper procedures are followed. The legal parameters of each of these alternatives are discussed in later sections of this monograph.

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[89] *See for example* Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200, 23 IDELR 1141 (N.D. Ill. 1996) where the court held that OSEP's policy and interpretation of the IDEA were dispositive and entitled to deference. The court ruled that school districts must continue to provide educational services to all special education students who have been properly expelled for reasons unrelated to their disabilities. The Fourth Circuit includes Md., N.C., S.C., Va., and W. Va. The Ninth Circuit includes Alaska, Ariz., Cal., Guam, Haw., Idaho, Mont., Nev., Or., and Wash.

[90] *OCR Memorandum: Long-term Suspension or Expulsion of Handicapped Students*, EHLR 307:05 (OCR 1988).

[91] The Fifth Circuit at the time of the *Turlington* decision included Ala., Ga., Fla., Tex., La., and Miss. Since that decision the former Fifth Circuit has been split into two new circuits, the Fifth Circuit (Tex., La., and Miss.) and the Eleventh Circuit (Ala., Ga., and Fla.).

[92] Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 [43 EDUC. L. REP. 857] (1988).

E. Placement Pending Administrative Proceedings

As indicated in the section above, the U.S. Supreme Court in *Honig v. Doe*[93] has ruled that courts may enjoin dangerous students from attending school if the school district and parents cannot agree on an alternative placement. If the school district and parents cannot reach an agreement concerning the proper placement for the student, the administrative appeals process would be set in motion. The Supreme Court's ruling gives the courts the authority to issue a temporary order regarding the student's educational situation until those proceedings are final. Although the school district would not be required to exhaust administrative remedies before seeking such a temporary order, the permanent placement dispute still would be subject to the administrative process.

In *Jackson v. Franklin County School Board*,[94] a case that was decided three years before the *Honig* decision, a district court in Mississippi upheld a school district's refusal to allow a student who had engaged in disruptive sexual conduct to return to school. The student initially had been suspended, but during his suspension was placed by the youth court in a state hospital. After his release he tried to return to school but school officials instead proposed a placement in a private facility. The student rejected all offered options and initiated due process appeals. He claimed that during the pendency of those proceedings he was entitled to return to his former public school placement. The school district, citing a possible danger to other students due to his psycho-sexual disorder, refused to readmit him. The district court held that the school district's actions were reasonable and did not violate the IDEA. The appeals court affirmed. This ruling has effectively been overturned by the *Honig* decision because the school district acted unilaterally in excluding the student rather than seeking a court injunction. However, the fact that the court approved of the student's exclusion is an indication that it would have issued an injunction under these circumstances if one had been sought. Several other courts also have issued injunctions allowing school districts to make temporary placement changes while administrative hearings were pending.[95]

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[93] 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686, 43 EDUC. L. REP. 857 (1988).

[94] 606 F. Supp. 152 [24 EDUC. L. REP. 185] (S.D. Miss. 1985), *aff'd*, 765 F.2d 535 [25 EDUC. L. REP. 1080] (5th Cir. 1985).

[95] Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223 [96 EDUC. L. REP. 98] (8th Cir. 1994); East Islip Union Free Sch. Dist. v. Andersen, 615 N.Y.S.2d 852 [93 EDUC. L. REP. 875] (N.Y. Sup. Ct. 1994); Binghampton City Sch. Dist. v. Borgna, 17 EHLR 677 (N.D.N.Y. 1991); Texas City Indep. Sch. Dist. v. Jorstad, 752 F. Supp. 231 [64 EDUC. L. REP. 1064] (S.D. Tex. 1990); School Bd. of the County of Stafford, Va. v. Farley, 16 EHLR 1119 (Va. Cir. Ct. 1990); Board of Educ. of Township High Sch. Dist. No. 211, Cook County, Ill. v. Kurtz-Imig, 16 EHLR 17 (N.D. Ill. 1989); School Bd. of the County of Prince William, Va. v. Wills, 16 EHLR 1109 (Va. Cir. Ct. 1989).

In an interesting case the federal district court in Massachusetts issued a preliminary injunction to allow a suspended student to return to school while administrative hearings were pending.[95] After the student had been suspended for repeatedly assaulting teachers who had broken up a fight he had been involved in, his father requested a special education evaluation. The evaluation found that he had special educational needs, but the parties could not agree on a placement or an IEP. In the meantime the student was receiving home tutoring. In issuing the preliminary injunction the court found persuasive the parents' claim that the school district should have evaluated the student earlier due to his abysmal academic record. However, the court vacated the preliminary injunction when the student enrolled in a parochial school rather than return to the public schools. The parochial school placement did not work out and the student again attempted to return to the public schools. However, the court refused to reissue the preliminary injunction, stating that to obtain relief the parents were required to file a new complaint under the IDEA. The court noted that administrative proceedings that could make the need for additional litigation unnecessary were currently ongoing.

A recent amendment to the IDEA, passed as part of the Gun-Free Schools Act, allows school districts to place a student who brings a weapon to school in an interim alternative educational setting for up to forty-five days.[97] The decision regarding what type of alternative program is appropriate is to be made by the school district's evaluation and placement team. If the parent or guardian objects and initiates administrative appeals, the student is to remain in the interim placement while the appeals are pending unless the parents and school officials agree to another arrangement. For purposes of this provision, a weapon is defined as a firearm such as a gun, or other destructive device, such as a bomb.[98]

F. Injunctions to Allow School Districts to Exclude Dangerous Students

An injunction is an equitable remedy issued by a court that either forbids or permits an action.[99] According to the Federal Rules of Civil Procedure an injunction is a drastic remedy that is the exception rather than the rule.[100] Most of the injunctions sought by school districts to ex-

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[95] Richard V. v. City of Medford, 924 F. Supp. 320 [109 EDUC. L. REP. 1181] (D. Mass. 1996).

[96] 20 U.S.C. § 1415(e)(3)(B).

[97] 18 U.S.C. § 921. *See also* Gail Sorenson, *The Gun-Free Schools Act of 1994: Are We Seeing Double*, NOLPE NOTES, June/July 1995 at 6.

[98] H.C. BLACK, BLACK'S LAW DICTIONARY (5th ed. 1979) at 705.

[99] Texas City Indep. Sch. Dist. v. Jorstad, 752 F. Supp. 231 [64 EDUC. L. REP. 1064] (S.D. Tex. 1990) *citing* FED. R. CIV. P. 65(a).

clude dangerous students are preliminary injunctions that would remain in force only until the administrative process to determine a permanent placement has been completed. To obtain a preliminary injunction the school district would have to show that it was substantially likely to prevail on the merits, that any potential injury it would suffer if the injunction were not issued outweighs any potential harm to the student if the injunction is issued, the injunction would not be a disservice to the public interest, and it would suffer irreparable harm if the injunction were not granted.[101]

1. Injunctions Granted

In *Texas City Independent School District v. Jorstad*[102] a federal district court in Texas issued an order enjoining a student it found to be dangerous from attending general education classes after the student's parents rejected a proposal for the student to attend a behavior management class. School officials testified that the student had committed numerous behavioral infractions, including assaults on students and teachers, destruction of school property, self-injurious acts, use of profanity, and making threats to kill himself and others. The court ruled that pending completion of administrative hearings, the student could either attend the recommended behavior management class or receive homebound instruction.

In an Eighth Circuit decision, *Light v. Parkway C-2 School District*,[103] the court held that even a child whose behaviors flowed directly from her disability was subject to removal from her educational placement when she posed a substantial risk of injury to herself or others. The student in this case was prone to impulsive, unpredictable, and aggressive behavior and had been placed in a self-contained classroom for students with mental disabilities. In that placement she exhibited a steady stream of aggressive and disruptive behaviors such as biting, hitting, kicking, poking, throwing objects, and overturning furniture. Documentation provided by the school district indicated that these acts occurred on an average of fifteen times per week. School officials proposed a change in placement to a class for autistic students. Her parents objected, but before a hearing could be held the school district imposed a ten-day suspension when the student hit another student on the head. The parents filed a lawsuit to

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[101] Texas City Indep. Sch. Dist. v. Jorstad, 752 F. Supp. 231 [64 EDUC. L. REP. 1064] (S.D. Tex. 1990) *citing* Treasure Salvors v. Unidentified Wreck, 640 F.2d 560 (5th Cir. 1981).

[102] 752 F. Supp. 231 [64 EDUC. L. REP. 1064] (S.D. Tex. 1990).

[103] 41 F.3d 1223 [96 EDUC. L. REP. 98] (8th Cir. 1994). The U.S. Department of Education has adopted the standard set forth in this decision as an official policy of the Department. OSEP Memorandum 95-16, 22 IDELR 531 (OSEP 1995).

have the suspension lifted. The district court found that maintaining the student in her then current placement was likely to result in injury either to the student or others. In affirming, the appeals court noted that the purpose of removal was not punishment, but to maintain a safe learning environment for all students.

The appeals court in *Light* also held that in addition to showing that a student presented a danger, a school district must show that it has made a reasonable effort to accommodate the student's disabilities so as to minimize the likelihood that the student would injure herself or others. The court stated that before issuing an injunction, a trial court must be satisfied that the school district had made reasonable use of supplementary aids and services to control the student's behavior. However, where injury remains substantially likely, a court may issue an injunction. The court emphasized that this test requires only a showing of the likelihood of injury and that a student need not first inflict serious harm before that child could be deemed substantially likely to cause injury. Furthermore, the court noted that injury is not defined only as an infliction that draws blood or sends a victim to the emergency room, but also includes offenses such as inflicting bruises, biting, and poking eyes.

Several other courts have issued injunctions to prohibit the application of the IDEA's status quo provision and allow the school district to temporarily change the student's placement until the completion of administrative review proceedings. These injunctions have been issued when the school district was able to show that the student in question had engaged in continuous aggressive behavior. A state court in Virginia issued such an injunction against a student who had set a fire in a school locker.[104] Prior to setting the fire the student had received forty-four disciplinary interventions during the school year for infractions such as spitting, being disruptive, fighting, throwing objects, and calling his teachers inappropriate names. Another state court in Virginia issued an injunction against a student, who had been involved in a number of fights, struck and yelled obscenities at teachers and administrators, and had to be handcuffed by the police to restrain him.[105]

Similarly, a federal district court in Illinois granted an injunction to a school district after school officials presented substantial evidence to indicate that maintaining the student in his then current educational placement was likely to result in injury to other individuals.[106] The school

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[104] School Bd. of the County of Stafford, Va. v. Farley, 16 EHLR 1119 (Va. Cir. Ct. 1990).

[105] School Bd. of the County of Prince William, Va. v. Wills, 16 EHLR 1109 (Va. Cir. Ct. 1989).

[106] Board of Educ. of Township High Sch. Dist. No. 211, Cook County, Ill. v. Kurtz-Imig, 16 EHLR 17 (N.D. Ill. 1989).

district presented the court with uncontradicted testimony that the student had violently struck other students, threatened to kill students, teachers, and staff, and stated that he had the means to do so. Similarly, a district court in New York found ample evidence to issue an injunction allowing a school district to place a student in a special education class while an administrative hearing was pending.[107] The student frequently had engaged in aggressive behavior such as punching other students without provocation, sticking a pencil in another student's ear, throwing his shoes at staff members, hitting staff members, throwing chairs, and overturning desks.

2. Injunctions Not Granted

Mere allegations by school officials that a student is potentially dangerous are not sufficient to obtain an injunction to prevent a student from attending school. The Supreme Court has indicated that there should be a presumption in favor of the student's then current educational placement.[108] In *M.P. by D.P. v. Governing Board of the Grossmont Union High School District*[109] a district court refused to grant a temporary restraining order to block the return to school of a student who had brought a gun to school. The court held that although bringing a gun to school could result in violence, in this situation the student had not attempted to use the gun nor had he created the possibility of an accidental shooting. The student had been suspended after a pellet gun had been found in his vehicle. He claimed that he had used the gun the night before while hunting. Given these facts, the court concluded that the student's return to school was not likely to result in injury to either himself or others.

A district court in Minnesota lifted a temporary restraining order issued by a state court after finding that the presence in school of a student who had been expelled on drug and weapons offenses was not likely to result in injury to himself or others.[110] The court determined that the school district had not satisfied either of the tests established by the Eighth Circuit in *Light v. Parkway*.[111] Even though the student had a history of behavior problems the court determined that there was no evidence that he would engage in similar activity involving drugs or weapons. In addition, the court found that the school district had not taken any steps to mitigate the risk of potential harm.

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[107] Binghampton City Sch. Dist. v. Borgna, 17 EHLR 677 (N.D.N.Y. 1991).

[108] Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 [43 EDUC. L. REP. 857] (1988).

[109] 858 F. Supp. 1044 [93 EDUC. L. REP. 1263] (S.D. Cal. 1994).

[110] J.B. by N.K. v. Independent Sch. Dist. No. 191, Burnsville, Minn., 21 IDELR 1157 (D. Minn. 1995).

[111] 41 F.3d 1223 [96 EDUC. L. REP. 98] (8th Cir. 1994).

In *Clinton County R-III School District v. C.J.K.*, a district court in Missouri stated that judicial intervention during the pendency of administrative proceedings is reserved for near-emergency situations where personal injury is substantially likely to occur.[112] In refusing to grant an injunction to the school district to allow it to exclude a student who had made repeated threats to school officials, frequently exploded in anger, and violently thrown furniture, the court held that although the threat of danger may have been greater than average, it was purely speculative to anticipate serious personal injury. The court noted that threats of damage to school property or disruption to the educational process were not sufficient for an injunction to be issued. The court appeared to be swayed by the fact that there were few recorded perceptions of physical danger by school officials in this situation even though several teachers testified that they were afraid of the student.

3. Obtaining an Injunction

To obtain a court injunction to exclude a student with disabilities pending administrative review of any recommended change in placement, school officials must show that the student is truly dangerous; mere allegations of dangerousness are not sufficient. Although it is not necessary to show that a student has inflicted injury in the past to establish that the student is potentially dangerous, school officials must present substantial credible and uncontradicted evidence that the student has the potential to inflict injury.[113] This may be accomplished by showing that the student has committed an egregious act of misconduct that is likely to be repeated or that the student has committed a number of acts of misconduct that have escalated in their degree of seriousness. Evidence of this must be presented to the court in the form of detailed disciplinary records and testimony of those who have witnessed acts of disruption and aggression.[114]

A school district is not required to provide parents with any notice prior to seeking an injunction according to a ruling by a federal district court in Florida.[115] The school district had successfully obtained a temporary restraining order enjoining the student from attending school but the parents complained that they were not given any notice that the school district intended to pursue judicial intervention. The court held that re-

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[112] 896 F. Supp. 948 [103 EDUC. L. REP. 721] (W.D. Mo. 1995).

[113] Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223 [96 EDUC. L. REP. 98] (8th Cir. 1994).

[114] Clinton County R-III Sch. Dist. v. C.J.K., 896 F. Supp. 948 [103 EDUC. L. REP. 721] (W.D. Mo. 1995); Eric J. v. Huntsville City Bd. of Educ., 22 IDELR 858 (N.D. Ala. 1995).

[115] School Bd. of Hillsborough County v. Student 26493257X, 23 IDELR 93 (M.D. Fla. 1995).

quiring the school district to provide pre-suit notice would be contrary to the Supreme Court's holding in *Honig* that a school district can overcome the exhaustion requirement by showing that exhaustion would be futile or inadequate. Ironically, school officials had invited the parents to attend an IEP review meeting before they sought the injunction but the parents indicated that they were unavailable on the date of the scheduled meeting. The meeting was rescheduled but in the meantime, school officials sought the restraining order.

III. Suspension of Special Education Students

A. A Short Suspension Is Not a Change in Placement

Although the courts have put restrictions on a school district's authority to expel a student with disabilities, they consistently have held that less harsh forms of discipline, such as suspensions, may be imposed without due process safeguards other than those required by *Goss v. Lopez*.[116] In *Stuart v. Nappi*[117] the district court in Connecticut held that an expulsion was a change in placement, but stated that school authorities could temporarily suspend disruptive students with disabilities. Also, in several of the other pre-*Honig* expulsion decisions, the courts have indicated that short-term suspensions are not subject to the IDEA's change in placement requirements.[118]

In one case in which a student was suspended for five days because he verbally abused a teacher, a district court in Illinois specifically stated that a suspension was not a change in placement. Characterizing a suspension as a sanction designed to teach the student, the court in *Board of Education of Peoria v. Illinois State Board of Education*[119] determined that the loss of class work during the suspension period did not outweigh the educational value of the suspension. Noting that students with disabilities are not immune from classroom discipline, the court further stated that a brief suspension could not reasonably be characterized as a change in placement. In a recent decision a district court in Alabama also characterized a suspension as having a remedial purpose.[120] The court found that the student's unique needs required a short-term suspension and that a suspension could be an appropriate instructional measure to assist a

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[116] 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed.2d 725 (1975). *See also* Uhler Letter, 18 IDELR 1238 (OSEP 1992).

[117] 443 F. Supp. 1235 (D. Conn. 1978).

[118] *See for example*, Doe v. Koger, 489 F. Supp. 225 (N.D. Ind. 1979); Kaelin v. Grubbs, 682 F.2d 595 [5 Educ. L. Rep. 710] (6th Cir. 1982).

[119] 531 F. Supp. 148 [2 Educ. L. Rep. 1032] (C.D. Ill. 1982).

[120] Eric J. v. Huntsville City Bd. of Educ., 22 IDELR 858 (N.D. Ala. 1995).

student in controlling his behavior. The court also held that a school district is not required to provide educational services during a short-term suspension. Recently, a district court in North Carolina held that a ten-day suspension of a student for possession of a gun clip and bullets did not violate the IDEA's status quo provision.[121]

In *Honig v. Doe*[122] the U.S. Supreme Court ruled that school districts may suspend a student with disabilities for up to ten days if the student poses an immediate threat to the safety of others.[123] The Court suggested that the suspension could provide a cooling down period during which school authorities and the parents could work out an agreement for an alternative, more appropriate, placement. The suspension period provides school administrators with the authority to immediately remove a dangerous student to protect the safety of others.[124]

The court decisions, holding that a short-term suspension is not a change in placement, do not require school authorities to provide any due process safeguards beyond those outlined in the *Goss v. Lopez*[125] decision. Thus, when it comes to a suspension, a student with disabilities may be treated in the same manner as any other student. Also, school officials are not required to determine if the misconduct is related to the student's disability for any suspension of ten days or less.[126]

B. Ten-day Limitation

Although it is fairly well settled that school districts may suspend students with disabilities for ten days or less without invoking the IDEA's change in placement procedures, it is unclear whether that ten-day limitation is consecutive or cumulative within one year. Unfortunately, the Supreme Court did not make this distinction in its *Honig v. Doe* decision.[127] However, the Ninth Circuit Court of Appeals has specifically stated that the *Honig* ruling did not support the argument, made by the parents of a student who had been suspended, that the ten-day limit re-

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[121] Glen III v. Charlotte-Mecklenburg Bd. of Educ., 903 F. Supp. 918 [104 EDUC. L. REP. 1141 (W.D.N.C. 1995)

[122] 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed 2d 686 [43 EDUC. L. REP. 857] (1988).

[123] Students may also be suspended for up to 10 days even when they do not pose an immediate threat to the safety of others if they have committed an act of misconduct. The Supreme Court's decision did not exclude suspensions for other offenses.

[124] Allan Osborne, *Dangerous Handicapped Students Cannot Be Excluded from the Public Schools*, 46 EDUC. L. REP. 1105 (1988).

[125] 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed 2d 725 (1975).

[126] Uhler Letter, 18 IDELR 1238 (OSEP 1992).

[127] Edward J. Sarzynski, *Disciplining a Handicapped Student*, 46 EDUC. L. REP. 17 (1988); Perry A. Zirkel & Siegfried C. Mueller, *The Ten Day Rule: Merely Consecutive or Also Cumulative?* NOLPE NOTES, Mar. 1989 at 1.

ferred to ten total days.[128] Also a federal district court in Louisiana found that a series of suspensions totaling twenty-two days in one school year did not violate the IDEA but did violate section 504 since the student's misconduct was related to his disability.[129] The court's reasoning is not entirely clear, but apparently it did not view the student's serial suspensions as a change in placement under the IDEA since no suspension by itself exceeded ten consecutive days. Similarly, a district court in Alabama upheld a school district's imposition of twelve nonconsecutive days of suspension for a special education student.[130]

On the other hand, the district court in New Hampshire found that a series of suspensions that cumulatively totaled more than ten days constituted a pattern of exclusion which resulted in a significant change in placement since the student's behavior was related to his primary disability.[131] The court held that once the student's suspensions reached the ten-day limit, the school district was required to invoke the IDEA's due process procedures.

A Department of Education memorandum provides some additional guidance as to when a serial suspension constitutes a change in placement.[132] According to that memorandum the following factors should be considered in determining whether a series of suspensions has resulted in a change in placement: the length of each suspension, the proximity of suspensions to each other, and the total amount of time the student has been excluded. The memorandum also stresses that the determination must be made on a case-by-case basis.

In many states, the acceptability of serial suspensions is addressed in state statutes, regulations, guidelines, or policies.[133] Absent specific state law, school administrators would be prudent to view the ten-day

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[128] Parents of Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489 [93 EDUC. L. REP. 547] (9th Cir. 1994).

[129] Jonathan G. v. Caddo Parish Sch. Bd., 875 F. Supp. 352 [97 EDUC. L. REP. 1052] (W.D. La. 1994).

[130] Eric J. v. Huntsville City Bd. of Educ., 22 IDELR 858 (N.D. Ala. 1995).

[131] Manchester Sch. Dist. v. Charles M.F., 21 IDELR 732 (D.N.H. 1994).

[132] *OSEP Memorandum to Chief State School Officers, "Questions and Answers on Disciplining Students with Disabilities,"* Apr. 26, 1995, as *reprinted in* 1996 UNITED STATES SCHOOL LAWS AND RULES (Michael Levin, ed.) at 142.

[133] For example, Massachusetts has specific requirements school districts must follow when suspensions for a special education student will accumulate to more than 10 days in a school year. These regulations require the evaluation and placement team to reconvene to determine if the student's misconduct is a manifestation of the disability or a result of an inappropriate placement. If the determination is positive in this regard, a new placement must be recommended. If the determination is negative the student may be suspended for more than 10 days but services must continue during the suspension period. Regulations for the implementation of ch. 766 of the Acts of 1972, ¶ 338.0 (1991).

limit as cumulative. In spite of some of the cases cited above, this view would be consistent with a long line of case law that treats serial suspensions as expulsions.[134]

As was stated in a previous section, a student's placement may be changed if it is determined that the student's misbehavior is a manifestation of the student's disability or is due to an inappropriate placement. A Department of Education policy letter indicates that the ten-day suspension clock would start over again if a student's placement has been changed.[135] This seems to indicate that new suspensions could be imposed after a change in placement even if the student had received the maximum allowable days of suspension prior to the change in placement. Again, however, state law may dictate whether or not the ten-day clock may be reset following a change in placement.

C. De Facto Expulsions

Courts consistently have held that any long-term exclusion from school is an expulsion regardless of the label school officials may put on it. Tradition holds that any exclusion from school for more than ten consecutive days procedurally is the equivalent of an expulsion. The U.S. Supreme Court, in its *Goss v. Lopez*[136] decision, discussed earlier, indicated that greater due process would be required for suspensions of more than ten days. In several policy letters the U.S. Department of Education has stated that a suspension of more than ten days requires the same due process as is required by an expulsion.[137]

The district court in Indiana in *Doe v. Koger*[138] ruled that the prohibition against expulsions included informal expulsions, such as indefinite suspensions. Similarly the Supreme Court of Nebraska held that sending a student home and telling his parents that he could not return constituted an expulsion.[139] Since the IDEA's change in placement procedures had not been followed, the court ruled that the student's exclusion from school was an illegal expulsion. Similarly, an Ohio district court, in *Lamont X. v. Quisenberry*,[140] held that a suspension of several months,

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[134] *See for example* Big Beaver Falls Area Sch. Dist. v. Jackson, 624 A.2d 806 [82 EDUC. L. REP. 861] (Pa. Commw. Ct. 1993); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979); Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979).

[135] Rhys Letter, 18 IDELR 217 (OSEP 1991).

[136] 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed.2d 725 (1975).

[137] Uhler Letter, 18 IDELR 1238 (OSEP 1992); Lieberman Letter, 20 IDELR 1463 (OSEP 1994); Johnston Letter, 20 IDELR 1468 (OSEP 1994).

[138] 480 F. Supp. 225 (N.D. Ind. 1979). *See also* Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979).

[139] Adams Cent. Sch. Dist. v. Deist, 334 N.W.2d 775 [11 EDUC. L. REP. 1020] (Neb. 1983), *modified* 338 N.W.2d 591 [13 EDUC. L. REP. 846] (Neb. 1983).

[140] 606 F. Supp. 809 [24 EDUC. L. REP. 772] (S.D. Ohio 1984).

even when home tutoring was provided during the suspension period, was a change in placement. The court found that a substantial programmatic modification had occurred and that the home instruction program developed for the students was not a normal procedure for the school district to use with disruptive students. The court indicated that a suspension of one or two weeks would have been acceptable.

IV. Other Disciplinary Sanctions

A. Disruptive Students May Be Transferred to an Alternative Placement

School districts may transfer a disruptive student to an alternative, even more restrictive, placement if the student's behavior substantially interferes with the education of others or presents a danger to the student or other students. A comment to the IDEA's least restrictive environment regulations indicates that when a student with disabilities is so disruptive in the regular classroom that the education of other students is significantly impaired, the needs of the student with disabilities cannot be met in that environment and a regular class placement may not be appropriate.[141] In spite of the recent emphasis on inclusion, most courts agree that a disruptive student's effect on the operation of a general education classroom can be considered when determining the least restrictive environment for that student.[142] However, school officials must remember that they have an obligation to provide the student with supplementary aids and services in an attempt to quell the disruptions and keep the student in the less restrictive setting. The student can be moved to a more restrictive placement only when school officials can show that supplementary aids and services are not adequate to meet the student's needs in the less restrictive setting.[143]

The district court in Connecticut in *Stuart v. Nappi*[144] stated that students with disabilities are not exempt from discipline and are not entitled to participate in programs if their behavior disrupts the educational process for others. The court indicated that school authorities may change the placement of a disruptive student to a more restrictive one by following procedures consistent with the IDEA. Several other courts have indi-

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[141] 34 C.F.R. § 300.552 note.

[142] Allan Osborne, *The IDEA's Least Restrictive Environment Mandate: A New Era*, 88 Educ. L. Rep. 541 (1994).

[143] *See for example* Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223 [96 Educ. L. Rep. 98] (8th Cir. 1994); Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396 [94 Educ. L. Rep. 707] (9th Cir. 1994).

[144] 443 F. Supp. 1235 (D. Conn. 1978).

cated that when the student's disruptive behavior is caused by the disability, consideration should be made for a change in educational placement.[145] One court, stressing that nothing in the IDEA deprives school officials of their ever-present right to maintain order and discipline, even suggested that the change in placement, in an emergency situation, could take place without parental consent.[146] However, since that ruling the U.S. Supreme Court has required a court injunction to remove truly dangerous students from school when an agreement cannot be reached with the parents for an alternative program or when school officials are not willing to await the outcome of administrative proceedings.[147] Given the Supreme Court's ruling, it is unlikely that any court would support a unilateral school district transfer of a student with disabilities regardless of how much of an emergency existed.

As the reader will recall, in *Honig v. Doe*[148] the U.S. Supreme Court, did not leave school officials powerless to deal with dangerous students. They may seek to reach an agreement for an alternative placement with the parents of a student with disabilities who poses a safety risk to others. If the parents adamantly refuse to consent to the change in placement, school officials may seek the assistance of the courts.[149] The high Court ruled that in this situation, school officials are not required to exhaust their administrative remedies before bringing court action, but in an appropriate case a court could issue a temporary order preventing a dangerous student from continuing at the school where the misbehavior occurred. In the interim period, while the permanent placement issue is being reviewed, the court could order a temporary alternative placement, such as homebound instruction. However, the burden clearly is on school authorities to show that the student is dangerous and that no other alternative except exclusion is feasible.[150]

As discussed earlier, several courts have issued *Honig* injunctions allowing school authorities to temporarily transfer a student to a more restrictive program while administrative hearings were pending in spite of objections by the student's parents. For example, one court issued a

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[145] School Bd. of the County of Prince William v. Malone, 762 F.2d 1210 [25 EDUC. L. REP. 141] (4th Cir. 1985). *See also* Southeast Warren Community Sch. Dist. v. Department of Pub. Instruction, 285 N.W.2d 173, (Iowa 1979); Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979).

[146] Victoria L. v. District Sch. Bd. of Lee County, Fla., EHLR 552:265, *aff'd.* 741 F.2d 369 [19 EDUC. L. REP. 478] (11th Cir. 1984).

[147] Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686, 43 EDUC. L. REP. 857 (1988).

[148] 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 [43 EDUC. L. REP. 857] (1988).

[149] *See also* Uhler Letter, 18 IDELR 1238 (OSEP 1992).

[150] *See* Price Letter, 20 IDELR 1256 (OSERS 1993).

preliminary injunction allowing the school district to temporarily place a student in a full-time special education classroom, pending completion of due process proceedings, after the district was able to show that the student was dangerous.[151] Another federal district court allowed school officials to exclude a dangerous student but ordered the school district to provide ten hours per week of home instruction that would afford the student the same opportunity to earn credits as he had in his prior placement.[152]

Prior to making any change in placement to one that is more restrictive a school district must provide the IDEA's due process safeguards.[153] For example, a district court in Louisiana held that a student's transfer to a more restrictive program was a change in placement that should have triggered the IDEA's due process safeguards. In its ruling the court also determined that the off-campus program, where a student would not have contact with students who did not have disabilities, was inherently more restrictive than the student's previous public school program where he was mainstreamed for a portion of the school day.[154] Furthermore, the court found that the transfer violated state regulations since the student was not re-evaluated prior to the transfer.

A recent decision out of North Carolina indicates that a transfer to another placement for disciplinary purposes may not always be a change in placement subject to the IDEA's procedural requirements.[155] In this case a student was found in possession of a gun clip and bullets on school property. After it had been determined that his behavior was not a manifestation of his disability, he was placed on an external school suspension for sixty days. Under the terms of the external school suspension he was allowed to attend the school district's management school. The management school is basically an alternative school where students with behavioral difficulties can continue their educations and receive instruction in behavioral management techniques. The court found that this transfer was not a change in placement since the management school provided the standard regular education curriculum and was capable of providing the student with the special education and related services called for in his IEP. The court also found that there was no evidence that the student population at the management school was predominantly com-

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[151] Binghampton City Sch. Dist. v. Borgna, 17 EHLR 677 (N.D.N.Y. 1991).

[152] Board of Educ. of Township High Sch. Dist. No. 211, Cook County, Ill. v. Kurtz-Imig, 16 EHLR 17 (N.D. Ill. 1989).

[153] *See* Boggus Letter, 20 IDELR 625 (OSEP 1993).

[154] Jonathan G. v. Caddo Parish Sch. Bd., 875 F. Supp. 352 [97 EDUC. L. REP. 1052] (W.D. La. 1994).

[155] Glen III v. Charlotte-Mecklenburg Sch. Bd. of Educ., 903 F. Supp. 918 [104 EDUC. L. REP. 1141] (W.D.N.C. 1995).

posed of dangerous students, but in fact the school provided educational services to other students with the same disability.

In a similar case, a district court in Mississippi denied a parent's motion for a preliminary injunction that would have prevented the school district from moving a student to an off-campus detention center.[156] Previously the student had been placed in the district's alternative school but school officials recommended the move to the off-campus self-contained classroom when the student's defiant and aggressive behavior continued in spite of the implementation of a behavioral management plan. An independent hearing officer approved the move to the detention center, which was located in a courtroom at the sheriff's office, for a maximum of forty-five days. In denying the parent's motion to block the transfer, the court stated that the school district's contention that the student was dangerous was reasonable in light of evidence that he had been disruptive, violent, and had demonstrated the ability to threaten and harm others.

In addition to the IDEA's change in placement procedures, section 504 regulations also require a re-evaluation prior to a significant change in placement.[157] If parents are aware of school officials' intent to change the placement, and are opposed, they may object to the proposed re-evaluation. However, courts have issued orders allowing school districts to re-evaluate students over their parents' objections.[158]

B. Modified or Reduced Day Schedule

It is not uncommon for school officials to place a continually disruptive student on a modified or reduced day schedule under the theory that the student's misbehavior may be caused by an inability to tolerate a full day of instruction. However such action must be taken only after the IDEA's change in placement procedures have been followed. The Ninth Circuit Court of Appeals, in *Doe v. Maher*,[159] held that a reduction in the schedule of a special education student for disciplinary purposes was a change in placement subject to the IDEA's procedures. The student had been placed on a half-day schedule following several incidents of mis-

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[156] Taylor v. Corinth Pub. Sch. Dist., 917 F. Supp. 464 [107 EDUC. L. REP. 830] (N.D. Miss. 1996).

[157] 34 C.F.R. § 104.35. *See also OCR Memorandum: Long-term Suspension or Expulsion of Handicapped Students*, EHLR 307:05 (OCR 1989).

[158] Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176 [103 EDUC. L. REP. 37] (5th Cir. 1995); School Bd. of the County of Stafford, Va. v. Farley, 16 EHLR 1119 (Va. Cir. Ct. 1990); School Bd. of the County of Prince William, Va. v. Wills, 16 EHLR 1109 (Va. Cir. Ct. 1989).

[159] 793 F.2d 1470 [33 EDUC. L. REP. 125] (9th Cir. 1986), *aff'd on other grounds sub nom.* Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 [43 EDUC. L. REP. 857] (1988).

conduct. Although his guardians agreed to the reduction in his schedule, it was accomplished without providing the full due process safeguards required by the IDEA for a change in placement. Thus before a school district can place a student with disabilities on a reduced day schedule, it must follow the IDEA's due process procedures.[160]

Precedent exists for placing students with disabilities on a modified schedule in nondisciplinary situations. The Fifth Circuit Court of Appeals has held that a school district was not required to provide a student who had multiple disabilities with a full day of instruction since a full day was not in the student's best interests.[161] The court held that there is no requirement that students with disabilities be provided with a full day of instruction.[162] In this case school officials had determined that the student was unable to tolerate a full day of educational programming. The same principle would apply to a student who has behavioral difficulties.

C. Corporal Punishment

In *Cole v. Greenfield-Central Community Schools*,[163] a district court in Indiana, a state that authorizes corporal punishment, held that paddling a student with disabilities, taping his mouth, and providing him with an isolated seating arrangement did not violate his rights. Finding that these punishments were not excessive and were within school officials' common law privileges, the court stated that school officials were entitled to substantial discretion in handling day-to-day discipline. Noting that the student in this case received the same punishment any other child would have received, the judge remarked, "An elementary school cannot be subjugated by the tyrannical behavior of a nine-year-old child."[164]

It must be emphasized that procedures such as the ones employed in the case discussed in the preceding paragraph can be used only when allowed by state law. Approximately half the states have outlawed corpo-

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[160] These procedures are outlined in 20 U.S.C. § 1415 and include written notice to the parents of the intended action. If the parents disagree with the contemplated action they may request a due process hearing. If a hearing is requested the student's placement may not be changed absent parental consent or a court order. Section 504 requires a re-evaluation before any significant change in placement occurs. 34 C.F.R. § 104.35(a).

[161] Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.3d 1285 [67 EDUC. L. REP. 1048] (5th Cir. 1991). *See also* Timms v. Metropolitan Sch. Dist., 718 F.2d 212 [13 EDUC. L. REP. 951] (7th Cir. 1983) *amended* 722 F.2d 1310 [15 EDUC. L. REP. 102] (7th Cir. 1983).

[162] For additional information about nontraditional program schedules *see* ALLAN OSBORNE, LEGAL ISSUES IN SPECIAL EDUCATION (1996).

[163] 657 F. Supp. 56 [39 EDUC. L. REP. 76] (S.D. Ind. 1986).

[164] *Id.*, 657 F. Supp. 56, 63 [39 EDUC. L. REP. 76, 83].

ral punishment.[165] If corporal punishment is used, it must be reasonable. In determining reasonableness Underwood and Mead suggest that courts will consider the following factors: the nature of the offense, the punishment inflicted, and the age and size of the student.[166] Educators may be sued for criminal liability if they use excessive corporal punishment.[167]

An unfortunate Michigan case provides an example of the care school officials need to exercise whenever physical punishment is contemplated. In *Waechter v. School District No. 14-030 of Cassopolis*[168] the teacher of a student with a congenital heart defect and orthopedic disabilities forced him to run a 350-yard sprint as punishment for talking in line. While making the run the student suffered cardiac arrhythmia and died. School officials were well aware of the student's physical condition and restrictions regarding physical exertion that had been imposed by his physician. The student's parents filed a lawsuit seeking damages alleging violations of the United States Constitution, section 504, and the state's wrongful death statute. Although the court held that damages were not available under section 504 it allowed the parents' allegations of substantive due process violations to stand. The court further held that school officials were not protected by qualified immunity.

D. Time-out and In-school Suspensions

Many special education teachers commonly employ a technique known as "time-out" as part of a behavior modification program. Time-out refers to the removal of a child from a setting for a specified and limited period of time. Generally, the student is placed in a secluded area of the classroom set aside for this purpose or a separate time-out room. Time-out is considered to be a minor disciplinary sanction unless the length of the time-out is excessive.[169] Generally, a time-out or an in-school suspension would not trigger the IDEA's due process safeguards as long as they are temporary and for a specified, minimal amount of time.[170] The

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[165] Hudgins and Vacca report that as of 1993 twenty-five states currently forbid corporal punishment. H.C. Hudgins & Richard Vacca, Law and Education: Contemporary Issues and Court Decisions, 327 (1995). For an excellent commentary on legal issues surrounding the use of corporal punishment in general *see* John Dayton, *Corporal Punishment in Public Schools: The Legal and Political Battle Continues*, 89 Educ. L. Rep. 729 (1994).

[166] Julie K. Underwood & Julie F. Mead, Legal Aspects of Special Education & Pupil Services (1995) at 190.

[167] H.C. Hudgins & Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions (4th ed. 1995) at 329.

[168] 773 F. Supp. 1005 [70 Educ. L. Rep. 500] (W.D. Mich. 1991).

[169] Stacy B. Seiden & Perry A. Zirkel, *Aversive Therapy for Handicapped Students*, 48 Educ. L. Rep. 1029 (1989).

[170] Eugene A. Lincoln, *Disciplining Handicapped Students: Questions Unanswered in Honig v. Doe*, 51 Educ. L. Rep. 1 (1989).

Tenth Circuit Court of Appeals, in *Hayes v. Unified School District No. 377*,[171] held that such a short-term disciplinary measure as time-out or an in-school suspension does not constitute a change in placement. However, the court did indicate that in-class disciplinary methods, since they were matters relating to the education of the child, were subject to the IDEA's administrative appeals process if the parents objected to them.

A district court in Tennessee has specifically held that time-out does not violate a student's right to an education.[172] The Eighth Circuit Court of Appeals also has held that an in-school suspension, even when it limits the student's access to special education classes and resources, does not violate the student's substantive due process rights. The court, in *Wise v. Pea Ridge School District*,[173] noted that an in-school suspension furthered the school district's legitimate interest in maintaining order and discipline. However, the Department of Education in a policy letter has indicated that in-school discipline that removes a student from the educational program will be viewed as a suspension.[174] Presumably, such in-school suspensions would be subject to the ten-day limit. It also may be assumed that an in-school suspension would not be counted toward the ten-day limit if the student received special education services during the in-school suspension period.[175] Once again, however, school districts must be cautioned that excessive use of in-school suspensions, even when special education services are provided, may be viewed as creating a pattern of exclusion from the student's usual learning environment. If such a pattern develops for behavior that is a manifestation of the student's disability, it could be viewed as a section 504 violation.[176]

While the above paragraphs indicate that the IDEA does not limit a school district's right to use normal disciplinary sanctions, short of expulsion, with a special education student, it should be noted that state policies may impose some restrictions. For example, some states also may limit the number of days a student may be placed on an in-school suspension if the student is not allowed to attend special education classes during the suspension period. If the student is being deprived of special education services, the state may treat an in-school suspension in the same manner as an out-of-building suspension so that it would count toward the ten-day limitation placed on suspensions.

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[171] 877 F.2d 809 [54 EDUC. L. REP. 450] (10th Cir. 1989).
[172] Dickens v. Johnson County Bd. of Educ., 661 F. Supp. 155 (E.D. Tenn. 1987).
[173] 855 F.2d 560 [48 EDUC. L. REP. 1098] (8th Cir. 1988).
[174] Williams Letter, 21 IDELR 73 (OSEP 1994).
[175] Eric J. v. Huntsville City Bd. of Educ., 22 IDELR 858 (N.D. Ala. 1995).
[176] Williams Letter, 21 IDELR 73 (OSEP 1994).

A state court in Pennsylvania held that an in-school suspension amounted to a de facto or constructive suspension because the student chose to go home rather than report for the in-school suspension.[177] The court reasoned that since school officials continued to assign in-school suspensions after it became abundantly clear that the student would opt to go home, they knew that an in-school suspension would result in the student's exclusion. Since the total number of days the student was excluded from school exceeded the maximum allowed by state law, the court held that school officials acted contrary to the mandates of the IDEA regarding student exclusions.

E. Detentions

Many school districts have found that the use of detention, or keeping a student after school, is an effective disciplinary tool. As a normal disciplinary procedure that is used with all students this does not seem to pose a problem when used with special education students.[178] A Department of Education policy letter states that after-school detentions do not constitute a significant change in placement.[179] The letter stresses, however, that any significant pattern of disciplinary actions for behavior caused by a disability could be sufficient cause to believe that a section 504 violation has occurred.

V. Other Issues

A. Treatment of Students Not Yet Identified as Disabled

It is obvious from the above that students who have been identified as disabled are entitled to the additional due process protections of the IDEA when harsh disciplinary sanctions may be imposed that would affect the delivery of special education services. In addition, a controversy has arisen as to how students who are undergoing an evaluation, but have not yet been classified as disabled, are to be treated. The Ninth Circuit Court has held that all disabled students, whether or not they were previously identified as disabled, are entitled to the procedural protections of the IDEA.[180] What remains controversial, however, is whether or not students who have been referred for an evaluation, but whose dis-

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[177] Big Beaver Falls Area Sch. Dist. v. Jackson, 624 A.2d 806 [82 Educ. L. Rep. 861] (Pa. Commw. Ct. 1993).

[178] *Walpole Pub. Sch.*, 22 IDELR 1075 (SEA Mass. 1995).

[179] Williams Letter, 21 IDELR 73 (OSEP 1994).

[180] Hacienda La Puente Unified Sch. Dist. of L.A. v. Honig, 976 F.2d 487 [77 Educ. L. Rep. 1117] (9th Cir. 1992).

ability status is unknown, are entitled to the protections of the IDEA. The issue is far from settled.

This issue arose in an early Connecticut case that was settled by a consent decree agreed to by the parties to the litigation. The consent decree, in *P-1 v. Sheldl*,[181] stipulated that a child undergoing an evaluation would be treated in a similar manner as a child already identified as disabled. However, a district court in Minnesota, noting that the IDEA's procedures are designed to minimize the risk of misclassifying students, held that to treat a student suspected of being disabled as disabled would violate the law. Since the student in *Mrs. A.J. v. Special School District No. 1*[182] had not been identified as disabled, the court ruled that school officials had no obligation to treat her as a special education student when imposing disciplinary sanctions, absent a showing of sufficient knowledge that the student was disabled within the meaning of federal and state laws. According to the court, mere suspicion that the student was disabled was not sufficient to trigger the IDEA's procedural protections.

Many school officials are justifiably concerned that a student facing a disciplinary sanction such as expulsion could request a special education evaluation and use the special education process simply as a means of thwarting the disciplinary process. That is exactly what happened in a California case, *M.P. by D.P. v. Governing Board of Grossmont Union High School District*,[183] where a student who had never been determined to be disabled was suspended and faced expulsion on a weapons violation. The student had never failed a course and had received above average grades but had a history of disciplinary problems. The student requested an evaluation before the expulsion hearing could be held. The evaluation team determined that the student was not disabled, but he subsequently contested that decision by requesting a due process hearing. While the hearing was pending, the school district refused to readmit the student. The student then sought a temporary restraining order from the district court to prevent the school district from excluding him. In issuing the restraining order, the court held that the procedural safeguards of the IDEA must be applied regardless of whether or not a stu-

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[181] EHLR 551:164 (D. Conn. 1979).

[182] 478 F. Supp. 418 (D. Minn. 1979); *but see* J.B. by N.K. v. Independent Sch. Dist. No. 191, Burnsville, Minn., 21 IDELR 1157 (D. Minn. 1995), *discussed supra*, where the court held that a student who had not yet been classified as disabled was entitled to the IDEA's protections. In the latter case there was substantial evidence that school officials were aware that the student might be disabled, *i.e.*, he had received special education services in elementary school, he was failing all of his courses prior to his expulsion, and school officials had advised the parent to obtain an assessment of the possibility that the student had attention deficit hyperactivity disorder.

[183] 858 F. Supp. 1044 [93 EDUC. L. REP. 1263] (S.D. Cal. 1994).

dent has been previously diagnosed as having a disability. The court was cognizant of the fact that a student could abuse the IDEA's procedures but held that the IDEA contained no remedy for such a possibility. The court also held that the student involved in this case did not pose a threat to either himself or others since he had not attempted to use the weapon or even show it off.

Similar circumstances existed in *Rodiriecus L. v. Waukegan School District No. 60*,[154] where an expulsion hearing was scheduled for a regular education student who had committed multiple thefts of school property. Prior to the expulsion hearing he requested a special education evaluation. When the evaluation team determined that he was not eligible for special education services he sought an independent evaluation and a due process hearing to contest that decision. In issuing a preliminary injunction to stay his expulsion the court held that the IDEA allows the opportunity for a hearing to contest any decisions regarding the identification and evaluation of a student as disabled and that a student's placement cannot be changed while that action is pending. The court noted that a student who requests a special education evaluation when facing disciplinary action may indeed be disabled and that the disciplinary action may be the precipitating event that could trigger awareness on the part of parents that the student has a disability. The court further noted that the student was not dangerous and that school officials could take other actions to prevent further thefts. However, the Seventh Circuit Court of Appeals reversed, stating that a flexible approach to applying the stay-put provision to students who have not yet been diagnosed as disabled is appropriate. The appeals court held that if the stay-put provision is automatically applied to every student who filed an application for special education, an avenue would be opened for disruptive students to forestall disciplinary action simply by requesting an evaluation. The appeals court further indicated that before a court invokes the IDEA placement protection provision, students must reasonably demonstrate that school officials knew of, or should have known of their disability. If the record indicates that the school neither knew nor should have known of a student's disability, the balance of harms tips in favor of the school district's interest in fulfilling its obligation to maintain strict discipline while protecting students and teachers from dangerous and incorrigible students according to the appeals court. The court concluded by stating that the IDEA was not designed to act as a shield to protect a disruptive student from routine and appropriate school discipline.

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[154] 889 F. Supp. 1045 [101 EDUC. L. REP. 913] (N.D. Ill. 1995), *rev'd*, 90 F.3d 249 [111 EDUC. L. REP. 94] (7th Cir. 1996).

Citing previous case law, a district court in Minnesota held that a student who has not yet been assessed as disabled at the time of disciplinary hearings may still assert the procedural protections of the IDEA.[185] The court found evidence that school officials were aware that the student possibly had a disability and that he was flunking all of his courses. Thus, the court held that even though he was being educated in all regular classes he could still be disabled. Similarly, in another case that same court ordered the reinstatement of an expelled student after determining that the school district knew or had reason to know that the student was in need of special education.[186] The student's mother had provided school officials with a copy of an evaluation diagnosing the student as having significant language deficits and a recommendation for special services from a private facility; however, the school district did not implement that recommendation.

However, in *Doe v. Manning*,[187] a case involving a student who was referred for an evaluation by her mother after a long-term suspension had been imposed, the district court held that her then current educational placement was one of suspension. Prior to the suspension the student had received private psychological treatment in a hospital but had never been classified as a special education student. In fact, she had been very successful in school prior to her hospitalization. Although the student's mother had been given information about how to refer the student for a special education evaluation before the school board imposed the long-term suspension, she did not sign the consent forms until several weeks after the school board action. The court held that under those circumstances the IDEA's status quo provision did not require the school district to either prove that the student was dangerous or reinstate her. However, the court did order the school district to provide tutoring during the suspension period because school officials had failed to provide the normal *Goss* due process hearing within seventy-two hours of the initial suspension. Similarly, the federal district court in Massachusetts has held that the proper status quo placement for a student who requested a special education evaluation while he was suspended was suspension.[188]

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[185] J.B. by N.K. v. Independent Sch. Dist. No. 191, Burnsville, Minn., 21 IDELR 1157 (D. Minn. 1995). It is interesting to note that in making its decision the court ignored its previous decision in Mrs. A.J. v. Special Sch. Dist. No. 1, 478 F. Supp. 418 (D. Minn. 1979). Rather, the court relied on the decision in M.P. by D.P. v. Governing Bd. of the Grossmont Union High Sch. Dist., 858 F. Supp. 1044 [93 EDUC. L. REP. 1263] (S.D. Cal. 1994).

[186] Davis v. Independent Sch. Dist. No. 196, Rosemount-Apple Valley-Eagan Sch., 23 IDELR 644 (D. Minn. 1996).

[187] 21 IDELR 357 (W.D. Va. 1994).

[188] Deborah V. v. Leonard, 21 IDELR 979 (D. Mass. 1993).

In another situation where the student's parents claimed that the IDEA's procedural protections were not limited only to children who had previously been determined to have disabilities, the court refused to issue an injunction to return the student to school, holding that the parents were required to exhaust administrative remedies regarding the school district's determination that the student was not disabled.[189] The school district had stayed the student's suspension while an evaluation was conducted. However, once the determination was made that the student was not disabled, the superintendent reconvened the suspension hearing.

A Department of Education memorandum supports the proposition that where a student has not previously been determined to be in need of special education and the parent requests an evaluation or a hearing after a suspension or expulsion has been imposed, the school district is not required to reinstate the student to his or her prior in-school status.[190] The memorandum noted however that a court may issue an order returning the student to school if it determines that the school district should have reasonably known that the student was disabled.

The 1979 Connecticut consent decree in *P-1 v. Shedd* discussed above also stipulated that students who are continually disruptive would be referred for an evaluation.[191] Since constant misbehavior may be an indication of an underlying, unidentified disability, this would appear to be a prudent practice in light of the affirmative obligations school districts have under the IDEA to locate and identify all students with disabilities.[192]

Students who are disabled, but who have not been classified as disabled by the school district, are still entitled to the IDEA's procedural protections. A recent federal appeals court decision is illustrative. In *Hacienda La Puente Unified School District of Los Angeles v. Honig*[193] the school district expelled a student it previously had determined was not eligible for special education. However, a hearing officer concluded that the student was seriously emotionally disturbed and that the behavior for which he was expelled was related to his disability. On appeal the school district claimed that the hearing officer lacked jurisdiction because the student was not a special education student. The Ninth Circuit Court of Appeals disagreed, stating that adopting the school district's position would frustrate the purpose of the IDEA because school districts could circumvent the statute's requirements simply by refusing to identify students as disabled.

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[189] F.N. v. Board of Educ. of Sachem Cent. Sch. Dist. at Holbrook, 894 F. Supp. 605 [103 Educ. L. Rep. 95] (E.D.N.Y. 1995).

[190] OSEP Memorandum 95-16 (OSEP 1995).

[191] P-1 v. Shedd, EHLR 551:164 (D. Conn. 1979).

[192] 20 U.S.C. § 1412(2)(C).

[193] 976 F.2d 487 [77 Educ. L. Rep. 1117] (9th Cir. 1992).

It is clear that the disciplinary process may not interfere with a student's right to be evaluated and identified. In other words if a student undergoing an evaluation is disciplined, the evaluation may not be halted during the disciplinary period.[194] Also, as soon as school officials become aware that a student may be disabled, they are obligated to provide the student with the full protections of the IDEA.[195]

B. Treatment of Former Special Education Students

Former special education students may still retain the IDEA's due process rights in some situations according to a ruling by a district court in Wisconsin. In *Steldt v. School Board of the Riverdale School District*[196] the parents of a student who had attended a special education class for emotionally disturbed students for several years requested that he be removed from the special education program. Although the student's teacher advised against this move, school officials conceded to the parent's request. The student did well for approximately one year but at the beginning of his junior year he committed a series of acts including assaulting other students, assaulting a teacher and school principal, destroying school property, and leaving the school building without permission. He was expelled for his misconduct and his parents contested that action. In issuing a preliminary injunction blocking his expulsion, the court stated that a reasonable argument could be made that a parent's request to withdraw a student from special education does not change the student's classification as a student in need of special education, especially in the absence of a formal re-evaluation. The court stressed, however, that school officials could return to court to seek an injunction against the student's return to school if they believed he was likely to cause injury.

C. Individualized Discipline Program

A school district may develop an individualized disciplinary program and incorporate it into a special education student's IEP; however, students with disabilities are not necessarily entitled to an individualized disciplinary program. The federal district court in Maryland, in *Pratt v. Board of Education of Frederick County*,[197] held that each IEP must be individually tailored to meet the needs of the student, but subject to that requirement, the policies outlined in the student handbook could be made applicable to a student with disabilities. Another case held that a behav-

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[194] ALLAN OSBORNE, LEGAL ISSUES IN SPECIAL EDUCATION (1996).

[195] Doe v. Rockingham County Sch. Bd., 658 F. Supp. 403 [39 EDUC. L. REP. 590] (W.D. Va. 1987).

[196] 885 F. Supp. 1192 [100 EDUC. L. REP. 984] (W.D. Wis. 1995).

[197] 501 F. Supp. 232 (D. Md. 1980).

ioral management plan utilizing negative consequences for misconduct is not inappropriate.[198]

Although an individualized disciplinary program may not be required, it is highly recommended for a special education student who has a history of behavioral problems. When developing an IEP for such a student, school officials should clearly explain what is expected of the student and what sanctions will be imposed if those expectations are not met. Including a disciplinary plan in an IEP can prevent many problems. If the need to respond to misbehavior arises, school officials may follow the steps outlined in the IEP.[199] As discussed above, the appeals court in *Hayes v. Unified School District*[200] held that in-class disciplinary methods are subject to the IDEA's administrative appeals process; however, if school personnel act in accordance with a valid IEP, it is unlikely that their actions will be overturned by a hearing officer or court.[201] However, a discipline plan providing for a contingency placement in the event that the student's misbehavior worsens may not be binding if the parents challenge the change in placement. As with all special education instructional methods, the behavior management program listed in the IEP must be developed according to accepted practices in the field and should be designed to respond to the student's unique needs.

D. Effect on the Juvenile Court

The procedures and requirements outlined in this monograph refer only to disciplinary sanctions imposed by the schools. These court rulings do not affect the ability of the courts to impose sanctions of their own in cases involving criminal complaints. This would even involve criminal actions that may have arisen in the school setting. A family court in New York specifically rejected a parent's contention that the *Honig* decision divested it of jurisdiction in a truancy proceeding.[202] The court held that *Honig* did not divest the courts of subject matter jurisdiction. In another New York case a family court held that the court's considerations at a dispositional hearing in a juvenile delinquency proceeding include more interests than those of the student's and are broader than just ensuring that the student receives a free appropriate public education.[203] The court emphasized that if it found that the student required

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[198] Eric J. v. Huntsville City Bd. of Educ., 22 IDELR 858 (N.D. Ala. 1995).
[199] Edward J. Sarzynski, *Disciplining a Handicapped Student*, 46 EDUC. L. REP. 17 (1988).
[200] 877 F.2d 809 [54 EDUC. L. REP. 450] (10th Cir. 1989).
[201] *See for example Cabarrus County (N.C.) Sch. Dist.*, 22 IDELR 506 (OCR 1995).
[202] *In re* Thomas W., 560 N.Y.S.2d 227 [62 EDUC. L. REP. 1122] (N.Y. Fam. Ct. 1989).
[203] *In re* Christopher V.T., 620 N.Y.S.2d 213 [96 EDUC. L. REP. 1060] (N.Y. Fam. Ct. 1994).

supervision, treatment, or confinement, it must also consider the community's need for protection from him.

However, if noncriminal misconduct arises in the school situation, school officials may not resort to court action in lieu of following the IDEA's due process procedures. In separate actions, a state court and a federal district court in Tennessee have ruled that school districts may not file unruly child petitions in the juvenile court without first following the IDEA's change in placement procedures. In the state court action the court found that the school district referred the student to the court system instead of evaluating his behavior in light of his disability and finding an appropriate placement.[204] The court stated that school discipline problems must be addressed within the framework of the school system before school officials can resort to the courts. The federal court, citing the state court's decision, held that filing an unruly child petition was a change in placement for the IDEA's purposes because juvenile proceedings have the potential to change a student's educational placement in a significant manner.[205] In this case there was no evidence to suggest that the student presented a risk of injury to anyone.

Recently passed legislation, the Gun-Free Schools Act of 1994,[206] requires school districts to establish policies requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to school. Another section of that same legislation states that the provisions of this law are to be construed in a manner consistent with the IDEA.[207]

A juvenile court cannot order a placement in special education, circumventing the procedures for placements and administrative review spelled out in the IDEA.[208] A court may, however, order a school district to evaluate a student if it has reason to believe that the student has special needs that have been overlooked by school officials.[209] If the student is found to have special needs the school district would be required to make an appropriate placement. Courts may of course, order the detention or confinement of a special education student just as they can any juvenile. When a special education student is detained by

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[204] *In re* Tony McCann, 17 EHLR 551 (Tenn. Ct. App. 1990).

[205] Morgan v. Chris L., 927 F. Supp. 267 [110 EDUC. L. REP. 190] (E.D. Tenn. 1994).

[206] 20 U.S.C. § 8922, *enacted as* Pub. L. No. 103-382, 108 Stat. 3908 (Oct. 20, 1994).

[207] 20 U.S.C. § 8921(c).

[208] *In re* J.D., 510 So. 2d 623 [41 EDUC. L. REP. 389] (Fla. Ct. App. 1987); Oscar F. v. County of Worcester, 587 N.E.2d 208 [72 EDUC. L. REP. 1003] (Mass. 1992); *In re* Roger S., 658 A.2d 696 [100 EDUC. L. REP. 619] (Md. 1995).

[209] *See In re* Jackson, 352 S.E.2d 449 [37 EDUC. L. REP. 383] (N.C. Ct. App. 1987).

the courts, the school district is still responsible for providing special education services.[210]

Students with disabilities eligible for special education services are still entitled to a free appropriate public education even when placed in a juvenile detention or correctional facility.[211] The federal district court in Massachusetts held that although their incarcerated status would require adjustments in the delivery of services, it did not eviscerate the right of juveniles in county correctional facilities to receive those services.[212]

E. Guns, Alcohol, and Drugs

In 1994 Congress passed new legislation known as the Gun-Free Schools Act[213] that, in part, amended the IDEA's provisions. The Gun-Free Schools Act compels states to pass legislation to require school districts to expel students who bring weapons to school for at least one year. The law states that its provisions are to be construed in a manner consistent with the IDEA[214] and allows the top school official to modify the expulsion requirement on a case-by-case basis. However, the law allows the school district to provide educational services in an alternative setting. A weapon, as used in this Act, is defined in other federal legislation as a firearm, such as a gun, or other destructive device, such as a bomb.[215]

A separate provision amended the IDEA to allow school officials to place a student with disabilities who brings a weapon to school in an alternative educational setting for up to forty-five days.[216] The decision regarding what constitutes an appropriate interim alternative placement is to be made by the same group of persons charged with developing, reviewing, or revising a student's placement under an IEP.[217] If the parents object to the decision to place the student in an alternative program and request an

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[210] *See* Ashland Sch. Dist. v. New Hampshire Div. for Children, Youth, and Families, 681 A.2d 71 [112 EDUC. L. REP. 284] (N.H. 1996); Donnell C. v. Illinois State Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993); Green v. Johnson, 513 F. Supp. 965 (D. Mass. 1981).

[211] 34 C.F.R. § 300.2(b)(4).

[212] Green v. Johnson, 513 F. Supp. 965 (D. Mass. 1981). *Also see* Donnell C. v. Illinois State Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993) *and* Alexander S. v. Boyd, 876 F. Supp. 773 [98 EDUC. L. REP. 72] (D.S.C. 1995).

[213] 20 U.S.C. § 8921.

[214] OSEP has recently stated that IDEA-eligible students who are expelled under the Gun-Free Schools Act must continue to receive educational services during the expulsion period. Hartman Letter, 23 IDELR 894 (OSEP 1995).

[215] 18 U.S.C. § 921.

[216] 20 U.S.C. § 1415(e)(3)(B).

[217] 20 U.S.C. § 1415(e)(3)(B)(ii) which refers to the individuals described in 20 U.S.C. § 1401(a)(20). Those individuals include a school district representative qualified to either provide or supervise special education, the child's teacher, and the child's parents or guardian.

administrative hearing, the recommended interim placement is to be regarded as the student's then current placement for purposes of the IDEA's status quo provision.

Section 504 allows school districts to take disciplinary action against any student with disabilities who engages in the illegal use of drugs or alcohol to the same extent that it would take disciplinary action against students who do not have disabilities.[218] However, if the student is also entitled to the protections of the IDEA, the student must be afforded all of the protections of that statute. This would include making the manifestation determination and providing special education services during any expulsion period. Other provisions of section 504 specifically exclude illegal drug use from the definition of disability.[219] The IDEA does not include either alcoholism or drug dependency as a disability category.[220]

VI. Summary

One of the most controversial issues that has come before the courts since the IDEA was passed involves the imposition of disciplinary sanctions on students with disabilities. This matter is not directly addressed by the Act or its implementing regulations; thus, school administrators must turn to case law for guidance. Although there is no direct reference to discipline in the IDEA, many of its provisions, such as those governing a change in placement, have implications for the application of disciplinary sanctions on special education students. Section 504 and the ADA also provide students with disabilities with additional due process protections.

This is a very delicate issue as it pits the duty of school administrators to maintain order, discipline, and a safe environment in schools against the special education students' rights to receive a free appropriate public education in the least restrictive environment. The authority of school officials to maintain discipline should not be undermined. However, a student should not be denied the rights conferred by the IDEA if the student's misconduct is caused by the student's disability.

The case law, as it has emerged in the past two decades, strikes a balance between the interests of school administrators to maintain order and the educational rights of special education students. School officials

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[218] 29 U.S.C. § 706(8)(C)(iv).

[219] "For purposes of [section 504] the term 'individual with a disability' does not include an individual on the basis of . . . psychoactive substance use disorders resulting from current illegal use of drugs." 29 U.S.C. § 706(8)(F).

[220] In Field v. Haddonfield Bd. of Educ., 769 F. Supp. 1313 [69 Educ. L. Rep. 724] (D.N.J. 1991) the court held that a school district was not required to provide a substance abuse program to a special education student who had been expelled for possession of drugs.

may impose disciplinary sanctions as long as they follow procedures that will not deprive special education students of their rights. School officials may impose normal disciplinary sanctions, including short-term suspensions, on special education students by following general procedures and providing normal due process.

Restrictions are placed on school authorities, however, when they wish to impose more drastic sanctions such as an expulsion or attempt to change the student's placement to one that is more restrictive as a consequence of the student's misconduct. In these situations the due process procedures in the IDEA replace the normal due process protections.

School district personnel first must determine if the student's offensive behavior was a manifestation of the student's disability or resulted from an inappropriate placement. If it was or did, the student may not be expelled. This determination must be made by a specialized and knowledgeable group of persons such as the school district's evaluation and placement team. In making this determination, the team must make an individualized inquiry, utilizing current psychological and other data relevant to the student's behavior. School districts may, however, temporarily suspend a disruptive or dangerous student. If they deem it necessary, they may attempt to negotiate another, possibly more restrictive, placement with the student's parents. If an alternative placement can be agreed on, the student's placement can be changed.

If the school district and the parents cannot agree on an alternative placement, that disagreement, like any other IEP disagreement, is subject to the IDEA's administrative appeals process. If school officials think that the student is dangerous and do not wish to have the student attend school while awaiting a final administrative determination, they may seek court intervention. If the court agrees that the student's presence in school creates a dangerous situation, the court may enjoin the student from attending school and may order an alternative placement on a temporary basis. However, since there is a presumption in favor of the current placement, school officials must show that maintaining the student in the school setting is substantially likely to result in injury either to the student or to others.[22]

To successfully obtain a court injunction to exclude a special education student while an administrative review of any recommended change in placement is pending, school officials must demonstrate that the student is truly dangerous. Although it is not necessary to show that a student has previously inflicted injury to establish that the student is poten-

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[22] Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed 2d 686, 43 Educ. L. Rep. 857 (1988).

tially dangerous, school officials must present substantial credible and uncontradicted evidence that the student has the potential to inflict injury. They may do so by presenting evidence that the student has committed an egregious act of misconduct that is likely to be repeated or documentation that the student has committed a number of acts of misconduct that have escalated in their degree of seriousness. Documentation must be presented to the court in the form of detailed disciplinary records along with the testimony of those who have witnessed acts of disruption and aggression.

Sufficient documentation is very important when school officials seek an injunction from the courts.[222] The burden is clearly on the school district to show that the student needs to be excluded. School officials who have been successful in obtaining injunctions have been able to show that the student's misbehavior was continuous and had the potential to inflict injury.[223] School officials also must show that in an attempt to curb the misbehavior they had implemented several supplementary aids and services without success.

New legislation provides different procedures for students who bring weapons to school. School officials may place any student with disabilities, who brings a weapon to school, in an interim alternative placement for up to forty-five days. If the parents object, and request an administrative hearing, the student may still be placed in the alternative setting while all appeals are pending.

If the school district's evaluation and placement team determines that there is no causal connection between the student's disability and misconduct, the student may be expelled. That decision, however, is subject to the IDEA's administrative appeals process. If the parents invoke administrative appeals, any expulsion would be stayed. In most jurisdictions, during the expulsion period the student must still be provided with educational services. This would require the school district to either provide homebound instruction or arrange for an alternative placement. School districts need to be prepared to provide some type of alternative educational program when the need arises to ensure that excluded students will still receive the free appropriate public education called for by the IDEA.[224]

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[222] For a case that shows the importance courts place on real-time recorded information, as opposed to after-the-fact testimony, *see* Clinton County R-III Sch. Dist. v. C.J.K., 896 F. Supp. 948 [103 EDUC. L. REP. 721] (W.D. Mo. 1995).

[223] For an excellent example of where school personnel had meticulously documented a student's misconduct and were thus able to provide the court with detailed testimony, *see* Eric J. v. Huntsville City Bd. of Educ., 22 IDELR 858 (N.D. Ala. 1995).

[224] Gail Sorenson, *Special Education Discipline in the 1990s*, 62 EDUC. L. REP. 387 (1991).

School officials have not been left totally hamstrung when disciplining students with disabilities, even though additional requirements have been placed on them. As indicated earlier, school officials may take swift action, in the form of a short-term suspension, to deal with an immediate situation that is deemed dangerous. If a dispute develops between the parents and school district over the appropriate long-term placement, the IDEA provides a mechanism to settle that dispute. In the meantime, the courts can provide an immediate solution. When school districts have shown that a student is dangerous, courts have issued orders allowing the school district to exclude the student until the placement dispute is settled. Some courts have ordered a temporary alternative placement or homebound instruction during the exclusion period.

School districts need to develop policies and procedures for dealing with disruptive special education students.[225] Important decisions concerning disciplinary sanctions for these students, which may eventually be reviewed in litigation, need to be made in accordance with specific policies that instruct administrators on how to proceed in a legally correct manner. Naturally, these policies need to be known by all disciplinarians and should be reviewed frequently to assure compliance.[226] These policies need to address various forms of discipline, including short-term suspensions, in-school suspensions, serial suspensions, and in-school disciplinary procedures such as time-out, detentions, and corporal punishment, as well as expulsions.[227]

The *Specific Incident Report* form in Appendix A can be used to record egregious acts of misbehavior resulting in serious disciplinary action. This form does not need to be used for minor acts of misconduct, it is only necessary for serious acts. For example, the *Specific Incident Report* would be used when a student assaults another student or violates the school rules regarding possession of drugs, alcohol, or weapons. Minor disciplinary infractions, such as shouting out in class, can be documented via anecdotal reports typically recorded by teachers or the school's usual office discipline referral form. The *Record of Disciplinary Action* form in Appendix B can be used to keep a running log of all disciplinary infractions and to record the school's attempts to address the student's misconduct. All disciplinary infractions should be logged on the *Record of Disciplinary Action* form even if they were previously recorded on the *Specific Incident Report* or another form.

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[225] Allan Osborne, *Dangerous Handicapped Students Cannot Be Excluded from the Public Schools*, 46 EDUC. L. REP. 1105 (1988).

[226] Gail Sorenson, *Update on Legal Issues in Special Education Discipline*, 81 EDUC. L. REP. 399 (1993).

[227] Gail Sorenson, *Special Education Discipline in the 1990s*, 62 EDUC. L. REP. 387 (1991).

It is far better to anticipate a problem and prevent one from escalating. If a student is known to have disabilities that may result in misbehavior, school officials should take steps to address those problems. An appropriate IEP that specifically contains goals, objectives, and methods for behavior management should be developed. Specific recommendations for dealing with disruptive behavior should be included in that IEP. Any recommendations may be consistent with, or even identical to, the procedures outlined in the student handbook; as long as they meet the student's individual needs, they are acceptable. Appendix C contains sample statements that could be included in the IEPs of students. One statement can be used for students who can be expected to fully conform with the school's rules and regulations. The second statement can be used with students who, because of their disabilities, may have difficulty conforming to the usual expectations. If the second statement is used, school officials should develop an individualized disciplinary policy. Appendix D provides a sample of a general *Individualized Disciplinary Policy* that could be included as part of an IEP. Appendix E provides a sample of a more specific *Behavior Management Program* that could be incorporated into the IEP of a student who has a history of behavioral problems.

How students who have been referred for an evaluation, but have not yet been identified as disabled should be treated if they commit a disciplinary infraction is a gray area. Several courts have held that these students are entitled to the IDEA's safeguards, especially if the school authorities either knew, or should have known, that the student was disabled. The safe course of action would be to provide these students with all of the due process rights conferred by the IDEA. The danger in doing this is that a nondisabled student could abuse the IDEA process simply to avoid or postpone disciplinary sanctions.

School districts may use normal disciplinary sanctions, such as detentions, time-out, in-school suspensions, corporal punishment, and suspension of ten days or less with special education students without providing any additional due process. However, school officials should be cautioned that any excessive use of these sanctions could be viewed as a section 504 violation if the sanctions are imposed for misbehavior that is caused by the student's disability. Again, a school district could avoid a legal entanglement by using an individualized disciplinary policy that calls for the application of normal disciplinary sanctions in a systematic manner.

Throughout any disciplinary process school officials should provide the parents of a student with disabilities with appropriate notice of the additional rights the student has under the IDEA and section 504. The sample letter and notice in Appendices F and G could be used for this purpose.

VII. Epilogue: IDEA Reauthorization

In 1996 the 104th Congress failed to reauthorize the IDEA, in part over disputes regarding disciplinary provisions.[228] Although the House of Representatives passed a bill to reauthorize the act, the Senate failed to pass its own version.[229] The House version included language that would allow school officials to transfer a student with disabilities to an interim alternative educational setting for up to forty-five days for possession of a weapon or drugs, sale or solicitation of medications or illegal drugs, or causing serious injury at school or a school function. The Senate draft also included language allowing for an interim placement in an alternative educational setting for similar reasons but added that students committing sexual assaults were also subject to removal from the regular education environment.

In addition to providing for interim alternative placements, several proposals attempted to deal with other sticky disciplinary issues. The House bill clarified that a student who has not yet been determined to be disabled may assert the protections of the IDEA if the school district had knowledge that the student was disabled. A Senate proposal would have allowed a hearing officer to order the removal of a student from the regular education environment for serious disruptive behavior. Furthermore, the Senate draft included a provision specifying how school officials are to determine whether a student's misconduct is a manifestation of the disability. Each bill also made it clear that school officials may report a crime to proper authorities. Since Congress ended its session without taking affirmative action, the reauthorization process will begin anew in the 105th Congress.

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[228] Julie F. Mead, *Wrestling with Equity: Reauthorizing the Individuals with Disabilities Education Act*, paper presented at the annual convention of the Education Law Association, New Orleans, La., Nov. 1996. (Note: In Dr. Mead's absence the paper was delivered by Julie Underwood.)

[229] The House passed an amended version of H.R. 3268. Information on the House bill and the Senate's draft was obtained from the Council on Exceptional Children's home page on the Internet at http://www.cec.sped.org/pp/legupdat.htm.

Appendix A

SPECIFIC INCIDENT REPORT

Type of incident:

___ Assault/Battery

___ Weapon Possession

___ Drug or Alcohol Possession

___ Drug or Alcohol Distribution

___ Theft

___ Destruction of Property

___ Civil Rights Violation

___ Other_____

Date and time of incident:_____

School/Location: _____

Names, addresses, and telephone numbers of students involved:

Names, addresses, telephone numbers, and positions/titles of witnesses:

Narrative description of incident:

Description of immediate action taken:

Planned follow-up action:

Have the parents/guardians of the students involved been notified?

_____Yes _____No _____By telephone _____By letter

Was the incident reported to the police?

_____Yes _____No

If yes, please provide pertinent information (name of investigating officer, file number, etc.):

Was the incident reported to any other agency?

_____Yes _____No

If yes, please provide pertinent information:

Were the students provided an opportunity to present their version of the incident?

_____Yes _____No

If yes, please provide pertinent details (you may attach other documents such as a hearing report):

Name of person filing report: _____

Position/Title: _____

_____

Signature Date

A copy of this report should be submitted to the Superintendent and the Director of Special Education (if applicable) within one day of the incident.

Appendix B

RECORD OF DISCIPLINARY ACTION

Student:_____ Grade:_____

School:_____ School Year:_____

Date	Disciplinary Code Infraction	Action Taken

APPENDIX C

SAMPLE IEP STATEMENTS

The following statement may be included in the IEP of a student whose disability should not cause behavioral problems:

The evaluation and placement team has determined that the student's disability is not one that will cause the student to misbehave or in any way prevent the student from observing the usual rules and regulations of the school as outlined in the student handbook. Therefore, the student is expected to conform to the school's disciplinary code. Any and all infractions will be dealt with in accordance with procedures set out in the student handbook.

(Note: Including the above statement in a student's IEP does not absolve the evaluation team of making the manifestation determination following a disciplinary infraction that may result in a long-term suspension or expulsion. However, it will put the student and parents on notice that school officials expect the student to conform to the usual rules and regulations and will provide the starting point for any discussion about a relationship between the student's behavior and disability.)

The following statement may be included in the IEP of a student whose disability may cause behavioral problems:

The evaluation and placement team has determined that the student's disability may, on occasion cause the student to misbehave or in some way disrupt the educational process for others. Therefore, an individualized disciplinary policy has been established for the student that is attached to and becomes a part of this IEP. The student is expected to conform to the individualized disciplinary policy, and any and all infractions will be dealt with as outlined in that policy. However, nothing in that policy is intended to prevent school authorities from taking such emergency or immediate steps as are necessary to restore order, maintain proper discipline, or otherwise prevent a dangerous situation from existing. If the student is unable to conform to the individualized disciplinary policy, the evaluation and placement team may consider a more restrictive placement that will better meet the student's needs.

APPENDIX D

SAMPLE INDIVIDUALIZED DISCIPLINARY POLICY

The evaluation and placement team recognizes that the student's disability will, on occasion, cause the student to manifest behavior that does not conform to the usual rules and regulations of the school. However, the evaluation team also recognizes that a standard of discipline must be maintained for the protection of all students and to minimize disruption to the educational process for all students. Therefore, this individualized disciplinary policy has been developed as part of the student's IEP.

The student has been placed in a special education program, and an IEP has been developed that is designed to reduce the effects of the student's disability and allow the student to perform according to his or her potential. This program is designed to help the student learn appropriate behavior through the use of behavior management techniques.

The student may not engage in any activity that will endanger himself or herself, other students, or staff members. The student also may not engage in any behavior that will damage school property, the property of other students, or the property of staff members. Furthermore, the student is not permitted to engage in activities that will interfere with the educational process for other students. To these ends, the student may not engage in any behavior that is prohibited by the student handbook, a copy of which is enclosed.

The following steps will be taken in the event of an infraction that substantially disrupts the educational environment for others:

1. The teacher will employ usual classroom disciplinary procedures.
2. If step one fails to correct the misconduct, the teacher will seek assistance from the school adjustment counselor and/or an administrator.
3. If the misconduct continues, the student may be removed from the classroom and temporarily detained in a time-out area.
4. If the misconduct continues, the student may be placed on an in-house suspension. Special education services will be provided in the in-house suspension room and the student will be expected to complete all assignments.
5. If the misconduct continues when the student returns to class, the student may be suspended for three to five days; during the suspen-

sion period the student will be expected to complete all school assignments as provided by the teacher.

6. If the student is suspended for a cumulative total of ten school days in any school year, the evaluation and placement team will reconvene within five days to determine if a more restrictive placement may be necessary or to develop some other appropriate alternative plan of action to curb the disruption.

The following steps will be taken in the event of an infraction that presents a threat to the safety of the student, other students, or staff:

1. The student will be removed from the situation.
2. An informal due process hearing will be held to determine if there is just cause for a suspension.
3. The evaluation team will be convened to determine if the student's misbehavior is causally related to his or her disability or is due to an inappropriate placement.

4a. If the team determines that the misbehavior is a manifestation of the student's disability, the team will determine if the student's current IEP is sufficient to meet the student's needs; if not, the IEP will be revised.

4b. If the team determines that the misbehavior is the result of an inappropriate placement, the student's placement will be reviewed and revised.

5. If the student is suspended for a cumulative total of ten school days in one school year, the evaluation team will reconvene within five days to determine if a more restrictive placement may be necessary or to develop some other appropriate alternative plan of action to curb the dangerous behavior.

Appendix E

SAMPLE BEHAVIOR MANAGEMENT PROGRAM

1. The student's teacher will record, by making a check mark on a chart, every fifteen-minute period of class time in which the student follows all class rules, is on-task, and behaves appropriately.

2. The student will be allowed to go to the computer lab to use educational game software as a reward for appropriate behavior. The student may exchange ten check marks for fifteen minutes in the lab.

3. If the student feels that he/she is "losing control" he/she may signal the teacher and will be allowed to go to the assistant principal's office for a voluntary time-out. He/she may return to class when he/she feels he/she has regained control.

4. If the student becomes disruptive and the teacher is unable to calm him/her down within a few minutes, he/she will be required to go to the assistant principal's office for an involuntary time-out. He/she may return to class at the assistant principal's discretion when he/she shows that he/she has regained control. All time spent in an involuntary time-out must be made up either during recess or after school.

5. The student will be provided with twice weekly guidance counseling sessions to help him/her learn to manage stress. During these sessions the counselor will discuss the situations that led to a time-out and alternatives to disruptive conduct.

6. The guidance counselor will also be available for crises resolution sessions when necessary.

7. The teacher will implement a conflict resolution curriculum in the classroom.

8. The teacher will be provided with consultation on a weekly basis with a behavioral specialist to develop appropriate classroom management techniques for dealing with the student.

9. A daily progress report will be sent home to communicate with the parents. This report will record the student's behavior and effort for each period during the day. This is to be signed by a parent and returned to school the following day.

10. Conferences will be held on a monthly basis with the student's parents to discuss progress.

APPENDIX F

LETTER TO PARENTS REGARDING SUSPENSION

Date:_____

Parent: _____

Address: _____

_____

Dear_____:

This is to inform you that an informal disciplinary hearing will be held regarding your child, _____, on _____, at_____in the Principal's office at the _____School. The specific reasons for the disciplinary hearing are as follows:

A decision will be made following the hearing as to what disciplinary action, if any, will be taken. One option to be considered will be a brief suspension. You are invited to attend the hearing. The hearing will be informal; however, your child will be given the full opportunity to respond to the above complaints. [Note: In situations where the immediate removal of the student is necessary for safety and to restore order, the student may be suspended prior to the hearing.]

Since your child is receiving special education services, the school's evaluation and placement team has been notified of this action. The team chairperson has been invited to attend the hearing.

A short-term suspension is considered to be a normal disciplinary action and requires only notification and the opportunity to be heard. If, however, the suspension extends to more than ten days, more elaborate procedures will be utilized. These procedures will include all of the due process safeguards your child is entitled to under the Individuals with Disabilities Education Act, which are outlined in the enclosed notice.

Sincerely,

(School Principal's Signature)

APPENDIX G

NOTICE OF RIGHTS TO A STUDENT WITH DISABILITIES FACING A LONG-TERM SUSPENSION OR EXPULSION

1. The student has the right to have the evaluation and placement team determine whether or not the disciplinary code infr ction is a manifestation of, or is related to, the student's disability or if the misbehavior resulted from an inappropriate placement.

2. If the evaluation and placement team determines that such a relationship exists, or the student was inappropriately placed, the student may not be suspended for more than ten days or expelled.

3. The student has the right to have the evaluation and placement team make a determination of whether or not the current educational placement and individualized education program are appropriate to meet the student's unique needs.

4. If the evaluation and placement team determines that the current program is not appropriate, the student has the right to be appropriately placed.

5. Any determination made by the evaluation and placement team may be appealed to an independent hearing officer. The hearing officer's decision may be appealed to a hearing review panel [in states so providing] and to the state or federal courts.

6. If the evaluation and placement team determines that no relationship exists between the student's conduct and disability, the student may be expelled. Any decision to expel the student also is subject to the appeals process listed in five above.

7. The student is entitled to receive special education and related services during any disciplinary exclusion from school for more than ten days. Even if the student is expelled, not all special education services may cease.

8. Until all such due process proceedings are completed, if any, the student has the right to remain in his or her current educational placement unless the student's presence would constitute a danger to the student or others or would cause a substantial disruption to the educational process. In this situation, the school district could seek a court order to prevent the student from remaining in his or her current educational placement. However, students who have been determined to have brought a weapon to school may be placed in an alternative educational setting for a period of up to forty-five days.

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